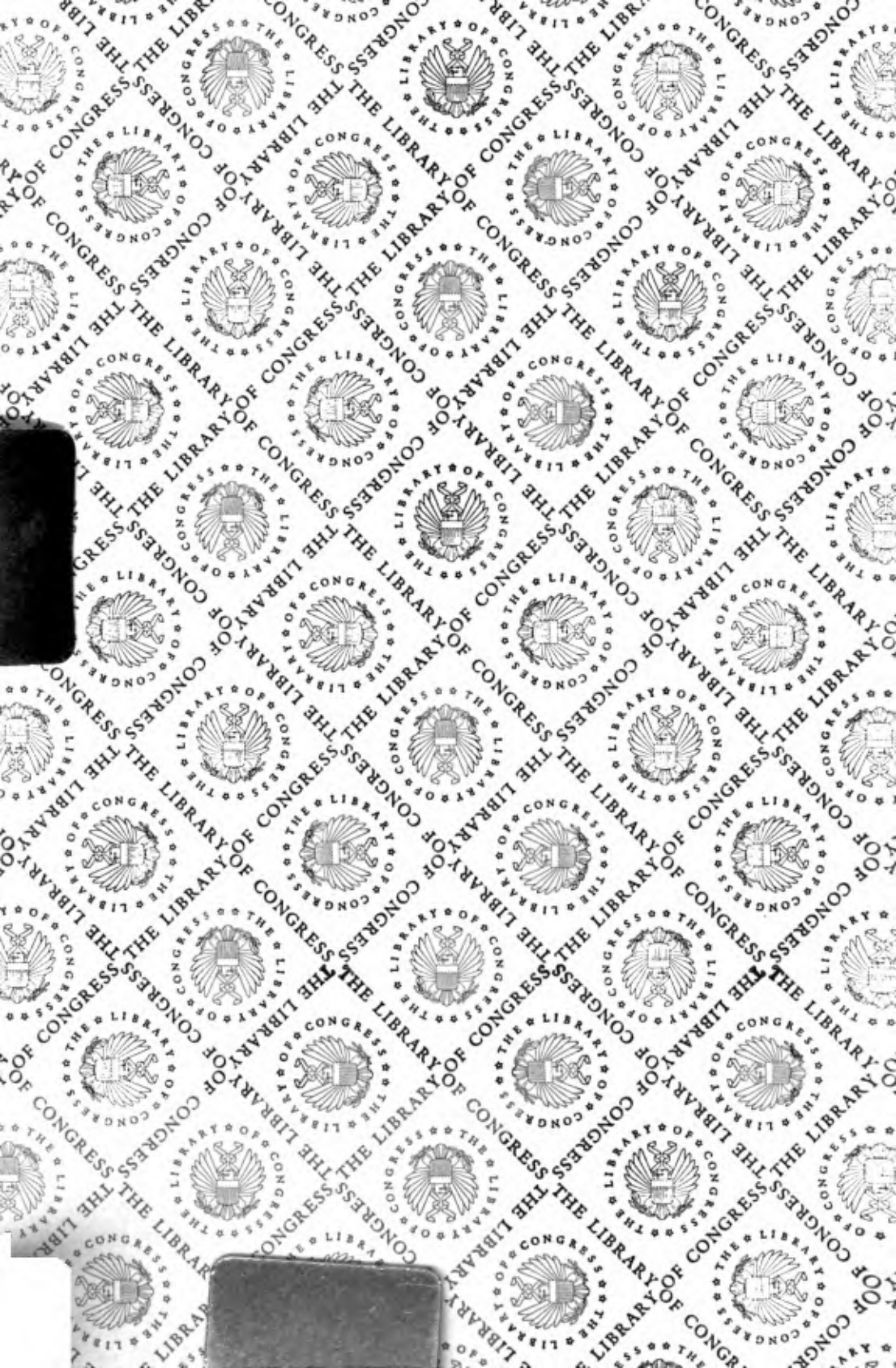
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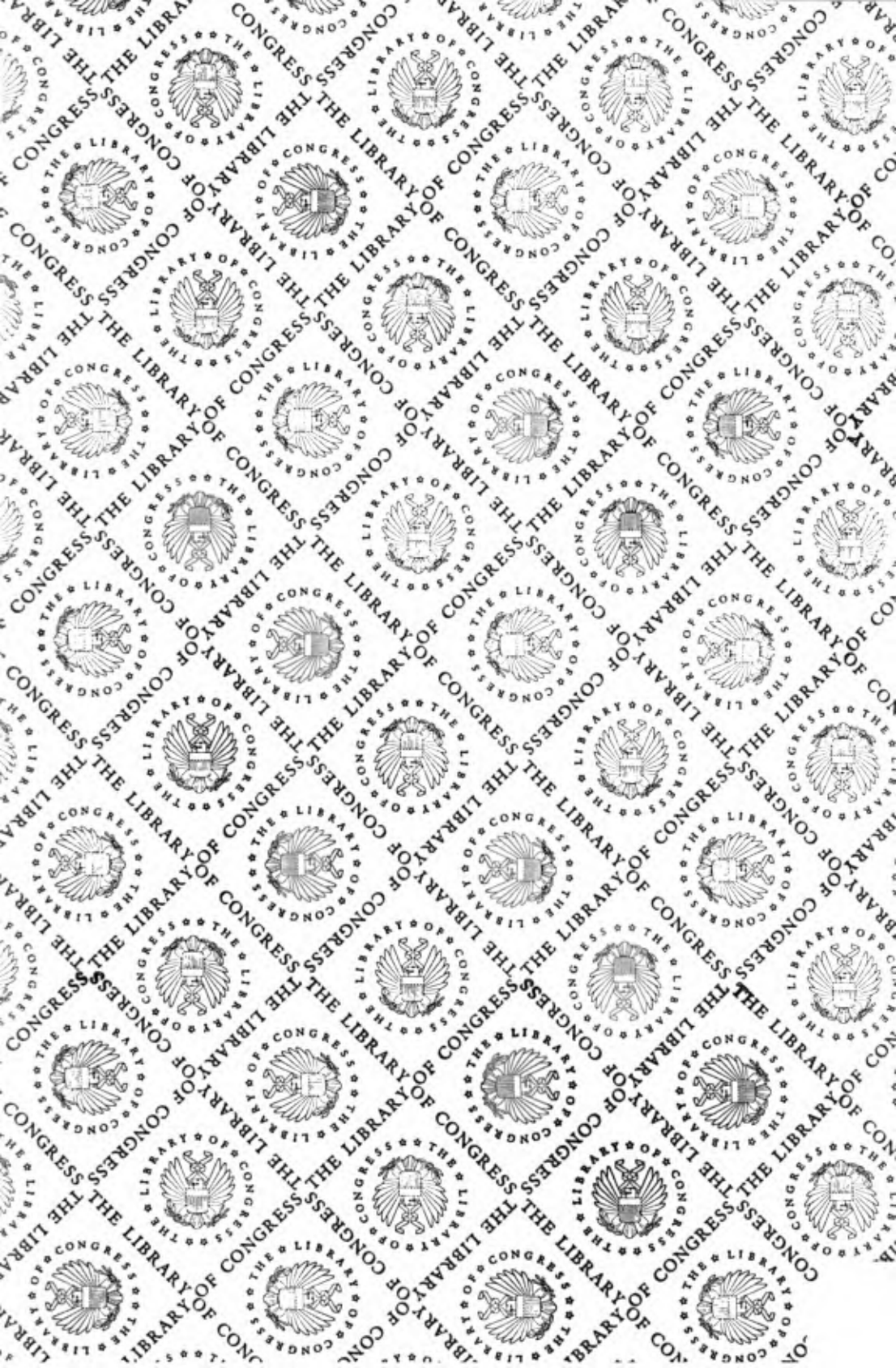
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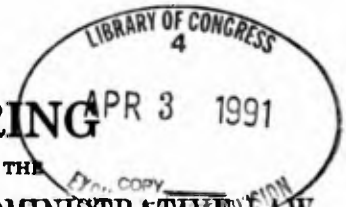
MODIFYING THE HONORARIA PROHIBITION FOR FEDERAL EMPLOYEES



HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

H.R. 325 (H.R. 109, H.R. 414, and H.R. 474)

TO AMEND THE ETHICS IN GOVERNMENT ACT OF 1978 WITH RESPECT TO THE PROHIBITION ON ACCEPTANCE OF HONORARIA

FEBRUARY 7, 1991

Serial No. 1

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MODIFYING THE HONORARIA PROHIBITION FOR FEDERAL EMPLOYEES

THURSDAY, FEBRUARY 7, 1991

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Romano L. Mazzoli, John F. Reed, George W. Gekas, Steven Schiff, and Jim Ramstad.

Also present: Roy A. Dye, legislative specialist; David A. Naimon, assistant counsel; Cynthia Blackston, chief clerk; Charles E. Kern and Raymond V. Smietanka, minority counsels.

OPENING STATEMENT OF CHAIRMAN FRANK

Mr. FRANK. The hearing of the Subcommittee on Administrative Law and Governmental Relations will now come to order.

This is a hearing which we have convened as early as it was possible for us to do so. We would have had it on Tuesday but the full committee had a meeting.

[The bills, H.R. 325, H.R. 109, H.R. 414, and H.R. 474, follow:]

I

102D CONGRESS
1ST SESSION

H. R. 325

To amend the Ethics in Government Act of 1978 with respect to the prohibition on acceptance of honoraria.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1991

Mr. FRANK introduced the following bill; which was referred jointly to the Committees on House Administration, the Judiciary, Post Office and Civil Service, and Armed Services

---

A BILL

To amend the Ethics in Government Act of 1978 with respect to the prohibition on acceptance of honoraria.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 501(b) of the Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989 and Public Law 101-280, is amended—

(1) by striking "An individual" and inserting "(1) Except as provided in paragraph (2), an individual"; and

(2) by adding at the end the following new paragraph:

"(2)(A) In the case of an officer or employee described in subparagraph (B), paragraph (1) shall not apply to an honorarium paid to such individual for an appearance, a speech, or an article published in a bona fide publication if—

"(i) the subject of the appearance, speech, or article and the reason for which the honorarium is paid is unrelated to that individual's official duties or status as such officer or employee; and

"(ii) the party offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of that individual's official duties.

"(B) The officers and employees to whom subparagraph (A) applies are any officer or employee other than—

"(i) a Member,

"(ii) subject to clause (iii), an officer appointed to his or her position by the President, by and with the advice and consent of the Senate, and

"(iii) in the case of commissioned officers of the uniformed services, a commissioned officer who is serving in a grade or rank for which the pay grade is grade O–7 or above.

"(C) A report on the acceptance of any honorarium under subparagraph (A) shall be filed in accordance with

rules and regulations established by each supervising ethics office under section 107 of this Act.

"(D) The amount of any honorarium accepted under subparagraph (A) shall not exceed the usual and customary fee for the services for which the honorarium is paid, up to a maximum of $2,000.".

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102D CONGRESS
1ST SESSION

H. R. 109

To amend the provision of the Ethics in Government Act of 1978 prohibiting the acceptance of honoraria in order to create an exception for honoraria paid for reasons unrelated to the recipient's duties or position.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1991

Mr. MORELLA introduced the following bill; which was referred jointly to the Committees on Post Office and Civil Service, the Judiciary, and House Administration

---

A BILL

To amend the provision of the Ethics in Government Act of 1978 prohibiting the acceptance of honoraria in order to create an exception for honoraria paid for reasons unrelated to the recipient's duties or position.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 501(b) of the Ethics in Government Act of 1978, as amended by section 601(a) of the Ethics Reform Act of 1989 (103 Stat. 1760), is amended—

(1) by striking "An" and inserting "(1) An";

(2) by striking "employee." and inserting "employee, except as provided in paragraph (2)."; and

(3) by adding at the end the following:

"(2) Paragraph (1) shall not apply to the receipt of an honorarium by an individual (excluding any individual who is a Member if—

"(A) the subject of the speech or article, or the reason for the appearance, for which the honorarium is paid, is unrelated to the official duties of the individual's office or position; and

"(B) the honorarium is not otherwise paid because the individual holds such office or position.".

(b) The amendment made by subsection (a) shall be effective as of January 1, 1991.

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102D CONGRESS
1ST SESSION

H. R. 414

To amend section 501 of the Ethics in Government Act of 1978 with respect to the prohibition on honoraria.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1991

Mr. RHODES introduced the following bill; which was referred jointly to the Committees on House Administration, Post Office and Civil Service, and the Judiciary

---

A BILL

To amend section 501 of the Ethics in Government Act of 1978 with respect to the prohibition on honoraria.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 501(b) of the Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989 and Public Law 101-280, is amended—

(1) by striking "An individual" and inserting "(1) Except as provided in paragraph (2), an individual"; and

(2) by adding at the end the following new paragraph:

"(2)(A) In the case of an officer or employee described in subparagraph (B), paragraph (1) shall not apply to an honorarium paid to such individual for an appearance, a speech, or an article published in a bona fide publication if—

"(i) the subject of the appearance, speech, or article and the reason for which the honorarium is paid is unrelated to that individual's official duties or status as such officer or employee; and

"(ii) the party offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of that individual's official duties.

"(B) The officers and employees to whom subparagraph (A) applies are any officer or employee other than a Member and other than a noncareer officer or employee whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS–16 of the General Schedule under section 5332 of title 5, United States Code.

"(C) A report on the acceptance of any honorarium under subparagraph (A) shall be filed in accordance with rules and regulations established by each supervising ethics office under section 107 of this Act.

"(D) The amount of any honorarium accepted under subparagraph (A) shall not exceed the usual and customary

fee for the services for which the honorarium is paid, up to a maximum of $2,000.".

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102D CONGRESS
1ST SESSION

H. R. 474

To amend title V of the Ethics in Government Act of 1978 and the Rules of the House of Representatives to allow speeches, appearances, and articles by officers and employees of the United States if unrelated to that individual's official duties or status.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 10, 1991

Mr. HANSEN (for himself, Mrs. BENTLEY, Mr. WILSON, Mr. LAGOMARSINO, and Mr. BATEMAN) introduced the following bill; which was referred jointly to the Committees on House Administration, Post Office and Civil Service, the Judiciary, and Rules

---

A BILL

To amend title V of the Ethics in Government Act of 1978 and the Rules of the House of Representatives to allow speeches, appearances, and articles by officers and employees of the United States if unrelated to that individual's official duties or status.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITION OF HONORARIUM IN TITLE V OF THE ETHICS IN GOVERNMENT ACT OF 1978.

Section 505(3) of the Ethics in Government Act of 1978 is amended by inserting before the period the following:

", and in the case of an officer or employee, excluding any amount which is paid for an appearance, speech, or article unrelated to that ndividual's official duties or status as an officer or employee.".

SEC. 2. DEFINITION OF HONORARIUM IN RULE XLVII OF THE RULES OF THE HOUSE OF REPRESENTATIVES.

Clause 3(c) of rule XLVII of the Rules of the House of Representatives is amended by inserting before the period the following: ", and in the case of an officer or employee, excluding any amount which is paid for an appearance, speech, or article unrelated to that individual's official duties or status as an officer or employee".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall take effect on January 1, 1991.

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Mr. FRANK. The Congress, in 1989, enacted legislation, much of which was very well intended, but which had a provision that I don't think was intended by very many people. That provision had the effect of preventing employees of the Federal Government, legislative, executive, judicial or any hybrid combination thereof, from writing articles or giving lectures outside of their regular work.

Now, obviously, none of us is for anything that would detract from the obligation of every Federal employee to work every minute of the time for which he or she is paid. That is not at issue here. We are talking here only about things that people do on their own time after they have unarguably satisfied every commitment they have to the Federal Government. This is not a case where there is any competition between the duties of the employee to the Federal Government and their other activities. We're talking purely about other activities.

What happened was we decided to legislate so that House Members in particular would be specifically restricted from activities which went under the heading of honoraria. We swept all other Federal employees in under that restriction. I am convinced, from having conversations with the people who were involved in the drafting, that they were not aware at the time of the effects of what they were doing; that is, passing the antihonoraria provision under the blanket of Federal employees and running that together with the existing definition of honoraria meant a much greater degree of restriction than anyone intended. We intended it for ourselves but not for other people.

I believe there is pretty wide agreement that the effect of this is unfair to Federal employees who, in my judgment—and I do not claim to speak, unfortunately, for a consensus here—have been the victims of far too much unfairness in the past 10 years anyway. I wish this was simply adding insult to injury, but this adds not only insult to injury but insult and injury to injury and insult. There is no need for us to do this whatsoever. So I believe we have a strong consensus.

This subcommittee has jurisdiction over this, and the post-employment restrictions were, in fact, worked out largely in this subcommittee and in the Governmental Affairs Committee on the other side. That was vetoed by the President. Much of what we did survived in the 1989 act. These honoraria provisions never had subcommittee and full committee consideration. It makes the point that while subcommittee and committee consideration can sometimes be a nuisance, it can also, I think, more often be a useful guard against improper and excessively hasty legislation. That's what happened here.

I understand the reasons why it was done as it was done, and I have no criticism of them. But that's what happened.

We tried to fix it late last year, when it came to my attention through a letter from a constituent who had suddenly been told about these restrictions. It became fairly clear that most of us thought it should be changed, but a dispute eventuated over who should be exempt and who should not be. There were some people who felt that we should exempt people who were paid at a grade 15 level and below, and others felt we shouldn't.

When you try to do something late in the session, through somewhat unusual procedures, the entire Congress becomes like the Senate, which is not on the whole a desirable goal, it seems to me, because you end up in a situation where if anybody is mad at anything, nothing happens. The Senate can function that way, but the entire Government cannot. So we were late in the year and we were in a situation where we needed virtual unanimity to do anything, and we didn't get it. So that's why we're back here.

It is my intention, in having called this hearing as quickly as possible, to hold a markup on this bill early in the year, fairly shortly after we come back. We are talking about employees who are currently under a restriction, which seems to many of us unfair. We will do what we can.

I know there's an injunction pending. That's up to the courts. Whatever happens in the courts, it seems to us, one way or the other, it is our obligation as the legislative body that enacted this to correct what seems to be a mistake.

I would then just say two other things which will take a little time now but are in the hope of saving time. I confess to a less than perfect personality, and one of my faults is that I have become one of the most impatient human beings in America, which on the whole I think probably saves me a lot of time. Please, when you testify, don't thank us and don't explain the bill to us. We know all that. We know you're grateful to us and we appreciate that. But let's get to the substance. In particular, I would tell you that I do not think you will have to spend a lot of your time documenting the unfairness of this. You're obviously entitled to do that, but I think we've got pretty good agreement on that.

There are two particular points of some controversy. I particularly invite your guidance on these, although you're obviously free to discuss whatever you want. One is the level at which we put this. Are we exempting any higher level of employees? Who gets covered by the exemption and who doesn't?

Second, the conflict of interest provisions. Obviously, nobody wants to have a situation where a high level regulator in a particular agency is giving speeches over breakfast to an association of those he or she regulates for a couple of thousand dollars. So we have to have some form of restrictions. On the other hand, I'm inclined to believe the conflict of interest restriction which I have included in the draft of the bill may go too far, where it says that people basically can't talk for money or write for money outside about the things they do inside. That may go too far. So I invite your help, both as to the level and as to the conflict of interest situations.

I want to pay my respects to the people in the Office of Government Ethics, who are here. Mr. Potts, he and his staff, have been very cooperative with us. I look forward to a very cooperative relationship with them in developing this bill—and knowing that they are there helps us also when administering the bill. So these are my comments. I appreciate your interest.

Mr. Gekas.

Mr. GEKAS. I'm not going to waste time saying "thank you, Mr. Chairman."

Mr. FRANK. I wouldn't believe you anyway.

[Laughter.]

Mr. GEKAS. Or that it's good to be here, or I'm looking forward to the content of the hearing. I'm not going to say any of that.

I am going to say that I come to this initial forum in my appearance before the subcommittee with a proverbial set of mixed feelings. I do believe there are instances that can be provable that Members of Congress, lawmakers, could engage in the receipt of honoraria under the old law and not be subject to the indictment of conflicts of interest. Yet we ban the honoraria, blanket, across the board, for lawmakers and for others on the theory and on the practice that the appearance, insofar as lawmakers are concerned, is enough to allow us to take the drastic step—drastic in the eyes of some—of removing honoraria from the face of the Earth.

I'm not so sure that we can craft a bill that will be able to determine what exceptions we are going to be able to accommodate in the overall problem of honoraria and appearances of conflicts of interest. But I must add that criterion, in my own judgment, in my own investigation and analysis of this bill, the appearance of conflict of interest. If the exemptions we're going to be able to fashion would be able to withstand my personal test of appearances of conflict, I will support the bill. If I have some qualms, of course, I will make it clear, without saying "thank you, Mr. Chairman," as to my feelings on that.

With that, I will begin with a rare circumstance in my life, and that is an open mind. Thank you very much.

[The prepared statement of Mr. Gekas follows:]

REMARKS OF THE HONORABLE GEORGE GEKAS
ADMINISTRATIVE LAW SUBCOMMITTEE HEARING
ON HONORARIA LEGISLATION
FEBRUARY 7, 1991

Modification of the prohibition against the acceptance of honoraria by government employees contained in the Ethics Reform Act is a matter which we should examine very carefully. The action we take will apply to virtually every civilian employee of the United States government, and, according to OPM, there were 3,496,573 of these as of May 1990. It also applies to over 2 million men and women serving this nation in active military service. Each one of these individuals is presumably capable of making an appearance, giving a speech or writing an article for which he or she might receive an honorarium were it not for the Ethics Reform Act amendments to the Ethics in Government Act of 1978.

It is manifest to virtually everyone, including those charged with enforcing this prohibition, that the scope of the ban on honoraria which became effective on January 1, of this year is too sweeping. The horror stories abound, and we have all heard them. We are also reminded that some excellent work, for which they were hopefully well compensated, was once turned out by a couple of U.S. Customs Service employees named Nathaniel Hawthorne and Herman Melville, a pair of diplomats named

Washington Irving and William Dean Howells, Bret Harte of the U.S. Mint and Walt Whitman of the Indian Bureau and the Department of Justice.

We most emphatically do not wish, however, to open the door to abuses which will injure the integrity of the government of the United States. In my view, drawing the line to allow remuneration if the subject of an appearance, speech, or article by a government employee and the reason for which it is paid are unrelated to that individual's official duties or status as such officer or employee seems a good place to start. Whether there should be an additional standard providing that the party offering the honorarium must have no interest that may be substantially affected by the performance or non-performance of the recipient's official duties is something we should look into. And whether there should be classes other than Members of Congress to which the exception to the ban should not apply is a further important question for us to decide.

Mr. Chairman, I join you this morning in welcoming the witnesses and await their testimony with interest.

Mr. FRANK. We are joined by two of our freshmen colleagues, Mr. Reed and Mr. Ramstad. Do either of you have opening statements?

Mr. REED. Since you have forbidden us to say nice things, I will say nothing.

Mr. FRANK. Good. Thank you.

Mr. Ramstad.

Mr. RAMSTAD. I'll use the same discretion, Mr. Chairman.

Mr. FRANK. I appreciate it.

We will begin with two of our colleagues who have been especially interested in this, who represent Federal employees quite well, and who are particularly concerned about the unfairness aspect, as they have been about trying to improve working conditions for Federal employees in general. We welcome Mr. Hoyer and Mrs. Morella, our colleagues from Maryland.

Mrs. Morella, why don't you begin.

STATEMENT OF HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mrs. MORELLA. Thank you. I appreciate, Mr. Chairman, your interest in this issue, and the fact that you have assigned this meeting to be so early in our session. I appreciate that very much. Mr. Gekas, I appreciate your open mind, which I find you often have, and welcome our two new Members to the committee, too.

It is a pleasure to testify before this Subcommittee on Administrative Law and Governmental Relations with regard to the honoraria ban.

I had a similar bill that I introduced at the end of the last session, when again, hearing from constituents, I learned that there was something that I did not believe Congress intended when we passed our ethics in government bill. The act that we did pass, while prohibiting Members of Congress from accepting honoraria is understandable, the broad blanket ban prohibiting all Federal employees from accepting any form of honoraria is not.

The intent of the bill that I have in, which is very similar to yours, Mr. Chairman, H.R. 109, amends the Ethics in Government Act of 1978, as amended by our Ethics Reform Act of 1989. It lifts the honoraria ban from employees who are full-time career, civil servants, but retains it for Members of Congress and noncareer officers compensated at a rate in excess of the so-called above GS–15 category of the general schedule. It would also exempt from the honoraria ban employees of Members of Congress.

This measure restores former law by exempting honorarium payments made to Federal career employees for speeches, appearances, articles and writings which are unrelated to one's Federal employment. I believe that was the intent of Congress. Technical amendments may be necessary to the bill, but that's basically what it's intended to do.

The bill is written to be effective retroactively to January 1, 1991. There may be, for example, a case in which a Federal employee had an article for publication accepted in November 1990; a check for $25, let's say, was issued in the third week of December, deposited on a Friday evening, December 28. It may or may not

clear in 1990. If it cleared in 1991, it would be considered income for 1991 and the Federal employee could be subject to a $10,000 fine. Without passage of legislation of this nature, that would be the case. Or another example may be an article submitted in May 1990 that was not published until January 1991, when the payment being made would come when published.

I also know of Federal employees who continue to write despite the new ban, but are putting publication of their works on hold until they hope that we resolve this issue, which I think needs to be done.

The courts have ruled that there is no ban against writing, publishing or appearing. Simply, the ban is against accepting honoraria. Honoraria, which could have been accepted, must then be donated by the payor. The author/performer must write or perform for free. Private sector writers and performers are unintentionally hindered in marketing their respective works when publishers and producers can procure similar products for free.

I have also heard that authors and performers who do not accept payments are shunned by their colleagues who expect to be paid because of the appearance that publishers or producers would benefit if they didn't need to pay their contributors. Some publications will not even consider printing an article unless a payment is made. Therefore, Federal employees would not even have the opportunity to have their work considered for publication.

I have given a lot of these little examples but, in short, the honorarium ban dictates that Federal employees who moonlight as authors and performers must work for nothing, often to their personal or professional detriment.

Many Federal employees accepted honoraria to supplement their income, which as we know is, on average, about 28 percent below salaries in the private sector. Many accept honoraria because it is a form of recognition for a particular talent, avocation or interest that they have. It has been suggested that if the honoraria ban is not amended, it would discourage Federal employees from contributing in many spheres and prevent them from being involved in the exchange of ideas.

We know, Mr. Chairman, and members of the subcommittee, that really, for decades, we have shackled Federal employees from participating in politics on their own time by imposing the ambiguous and convoluted provisions of the Hatch Act. And now again we are discouraging Federal employees from being creative on their own time and not as it relates to what they do professionally.

Essentially, we are sending a message to the public: If you are creative on your own time, don't join the Federal Government. If you are creative and a Federal employee, leave.

You know, as somebody who used to teach English, someone wrote an article that brought to mind the fact that we might not have had some of our great American literature had we had this ban in place. For example, can you imagine what would happen if Walt Whitman held his work for a favorable court decision, or for Congress to amend the present legislation? Walt Whitman was a Justice Department employee and he worked under seven Attorneys General.

"Moby Dick" might not be on the required reading list for high school students because Herman Melville, who worked at the Customs Service, would not have been able to publish it today and accept an honorarium. We have examples of Bret Harte and Nathaniel Hawthorne who worked for Customs. William Dean Howells and Washington Irving were members of the diplomatic corps. It could go on with other very distinguished Federal employees who have also contributed their talents in other ways.

I am dismayed when I think of many Federal employees who were recruited to their positions because of their expertise, talent and publications. And they were encouraged to continue these pastimes. Now the rules of the game have been changed and a creative pastime for pay—a democratic and capitalistic idea—is denied to the very people who are responsible for keeping our country in good working order.

An attempt by the Office of Government Ethics to clarify the law will become a maze. The 10-page explanation, with a request for comment published in the Federal Register, gave some interesting examples of what is permitted and what is not. Many of you have seen it—I know our chairman has and members of the committee—and there is also a precis in the Federal Times. If any of you do need it, we can get copies for you.

Some other real examples which have come to my attention are, for example, a Federal employee who is an ordained minister can perform marriage ceremonies at the church because he or she has a contract with the church. But, that person cannot accept any remuneration if a couple, who are not members of the church, wants the minister to perform the ceremony. It makes no sense.

A Federal employee can grow prize-winning roses and sell them, but cannot receive an honorarium for writing an article on growing roses, but can be paid for writing a book on roses. A GS-3 with a beautiful voice cannot accept a $10 honoraria for performing at a fundraiser for a nonpolitical organization because that would be an appearance.

I am pointing out there are so many ambiguities and inconsistencies. Mr. Gekas, you know, is a very talented piano player, and if he were a Federal employee——

Mr. GEKAS. Nobody would ever pay me.

[Laughter.]

Mrs. MORELLA. I have heard you, and I would, if that was the situation.

I am sure, Mr. Chairman, if the honoraria ban stands, we will have to appropriate additional money to agencies for their ethics officials and to the Office of Government Ethics to monitor each case and make a determination.

Currently, the Federal Government is experiencing difficulty, as we all know, in recruiting and retaining highly qualified and effective employees. Under these circumstances, Congress should not restrict Federal employees from pursuing creative activities totally outside the scope of their jobs that do not represent a conflict of interest.

I look forward to working very closely with you, Mr. Chairman, and your committee on this issue. I hope that there will be a uni-

fied effort in Congress to lift this inequitable ban as soon as possible.

Again, with the committee meeting that you're having today on your legislation, and with my colleagues' support and others, this certainly indicates we're on the right track to equity. I thank you very much.

Mr. FRANK. Thank you.

[The prepared statement of Mrs. Morella follows:]

CONSTANCE A. MORELLA
8TH DISTRICT, MARYLAND
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TESTIMONY OF
CONSTANCE A. MORELLA
before tha
SUBCOMMITTEE ON AOMINISTRATIVE & GOVERNMENTAL RELATIONS
on H.R. 109
FEBRUARY 7, 1991

Mr. Chairman, thank you for inviting ma to tastify befora the Subcommittee on Administrativa Law and Governmental Ralations in regard to tha honoraria ban.

As you may recall, Mr. Chairman, I introduced a similar bill last tarm, after raceiving many letters of concarn from federal amployaes. While prohibiting Members of Congrass from accapting honoraria is understandabla, tha broad, blankat ban prohibiting all federal employaas from accepting any form of honoraria is not. My bill this term, H.R. 109, amends the Ethics in Govarnment Act of 1978 as amanded by tha Ethics Raform Act of 1989; it lifts the honoraria ban from amployaas who are full-time caraar, civil sarvants but ratains it for Mambers of Congress, and non-caraer officers compansatad at a rata in excass of the "abova GS-15" catagory of tha Ganaral Schedula. This maasura rastores former law by exampting honorarium payments mada to federal carear amployeas for spaaches, appaarances, articlas and writings which are unrelated to one's faderal employmant.

The bill is writtan to ba effactiva retroactively to January 1, 1991. Thera may be, for axampla, a case in which a fadaral amployae had an article for publication accaptad in Novembar, 1990; tha check for $25 was issued in tha third waak of Oacambar, daposited on Friday evening, Oacambar 28. That chack may or may not clear in 1990. If it claarad in 1991, it would be considerad income for 1991 and the fedaral amployea could ba subjact to a $10,000 fina, without passage of my bill. Or taka an example of an article submittad in May 1990, but not publishad until January 1991, with paymant being made when published.

I know of fadaral amployees who continue to write despita tha naw ban but who ara putting publication of thair works on "hold" until this issue is resolved. Tha courts hava ruled that thera is no ban against writing, publishing or appearing. Simply, tha ban is against accapting honorarium.

Honoraria which could have been accepted must then be donated by the payor; the author/performer must write or perform for free. Private sector writers and performers are unintentionally hindered in marketing their respective works when publishers and producers can procure similar products for free. I have heard that authors and performers who do not accept payment are shunned by their colleagues who expect to be paid because of the appearance that publishers or producers would benefit if they did not need to pay their contributors. Some publications will not even consider printing an article unless a payment is made. Therefore, federal employees would not even have the opportunity to have their work considered for publication. In short, the honorarium ban dictates that federal employees who moonlight as authors and performers must work for nothing, often to his or her personal or professional detriment.

Many federal employees accepted honoraria to supplement their income (which is on the average 28% below salaries in the private sector). Many accept the honoraria because it is a form of recognition. It has been suggested that if the honoraria ban is not amended, it would discourage federal employees from contributing in many spheres of interest and prevent them from being involved in the exchange of ideas.

Mr. Chairman, for decades we shackled federal employees from participating in politics on their own time by imposing the convoluted provisions of the Hatch Act. Now we are discouraging federal employees from being creative on their own time. Essentially, we are sending a message to the public: if you are have a creative pastime, don't join the federal government; if you are creative and are a federal employee, leave.

Can you imagine what American literature would be like if Walt Whitman "held" his work for a favorable court decision or for Congress to amend present legislation. Whitman was a Justice Department employee and worked under seven attorneys general.

I am dismayed when I think of many federal employees who were recruited to their positions because of their expertise, talent and publications. And they were encouraged to continue these pastimes. Now the rules of the game have been changed and a creative pastime for pay -- a democratic and capitalistic idea -- is denied to the very people who are responsible for keeping our country in good working order.

An attempt by the Office of Government Ethics to clarify this law will become a maze. The ten page explanation, with a request for comment published in the Federal Register, gave some interesting examples of what is permitted and what is not. I'm sure you have seen it, along with a précis in the Federal Times. (If you haven't, I'll be glad to send you a copy; it makes interesting reading.)

Some other real examples which have come to my attention: a federal employee who is an ordained minister can perform marriage ceremonies at the church because she has a contract with the church. But, she cannot accept any remuneration if a couple, not a member of the church, wants her to perform the ceremony. A federal employee can grow prize winning roses and sell them but cannot receive an honorarium for writing an article on growing roses, but can be paid for writing a book on roses. A GS-3 with a beautiful voice cannot accept a $10 honoraria for performing at a fund-raiser for a non-political organization because that would be an appearance.

I am sure, Mr. Chairman, if the honoraria ban stands, we will have to appropriate additional money to agencies for their ethics officials and to the Office of Government Ethics to monitor each case and make a determination.

Currently, the federal government is experiencing difficulty in recruiting and retaining highly qualified and effective employees. Under these circumstances, Congress should not restrict federal employees from pursuing creative activities totally outside the scope of their jobs that do not represent a conflict of interest.

Mr. Chairman,I will work closely with you on this issue and I urge you to consider H.R. 109 favorably. I hope that there will be an unified effort in Congress to lift this inequitable ban, as soon as possible.

Mr. FRANK. Mr. Hoyer.

STATEMENT OF HON. STENY H. HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. HOYER. Mr. Chairman, I am deeply disappointed that your subcommittee has taken so long to get to this issue.

[Laughter.]

Mr. HOYER. It is one that we need to address immediately. We overreacted, we overreached, and we did something that didn't need to be done. As of January of next year, I will be in public office for 25 years. I have never taken honoraria. I do not condemn it. I agree with Mr. Gekas, that there is certainly the overwhelming majority of times when honoraria had no effect on public officials. However, it clearly had a bad appearance and we needed to get rid of it. There was a consensus in the Congress that we get rid of it because it gave the appearance of conflict of interest, if not the reality of conflict of interest. However, we overreached. We went far beyond what we needed to do.

I have written testimony and would ask that that be included in the record.

Mr. FRANK. Without objection, it will be included in the record.

Mr. HOYER. I am a strong supporter, Mr. Chairman, of your bill. I understand that you're going to get some expert testimony on how we ensure that we do not have a conflict of interest. It is sort of like obscenity, I suppose. It's hard to define, but when you see it, you know it. I think most employees, when they see it, know it. We obviously have to preclude from people who are making regulatory decisions getting money from those who they regulate, putting it in the phrase of honoraria.

On the other hand, I think Mrs. Morella's testimony was excellent in citing some examples where the absurdity of what we have done is very, very clear and needs to be rectified, (a) to make sense, and (b), on behalf of our Federal employees.

Mr. Chairman, I am hopeful that we can get this legislation through the Congress as quickly as possible. I will tell you, as a member of the Appropriations Committee, if we don't get it through, your request of last year to put it on the Treasury-Postal bill, which we would have done, as the chairman indicates, if we could have gotten consensus—unfortunately, there were some concerns, and so we didn't want to do it in the rush of passing appropriation bills last year. But we certainly will do it this year if we can't get substantive legislation through. I hope you can. I believe you can. I am going to strongly work with you, Mr. Chairman and members of the committee, to accomplish that objective.

Mr. FRANK. Thank you, Mr. Hoyer. I remember your active interest in this last year. The only thing I would ask you is, please don't again analogize this to obscenity because I don't want to have to make a sequential referral to Senator Helms.

[Laughter.]

[The prepared statement of Mr. Hoyer follows:]

STENY H. HOYER

FEBRUARY 7, 1991

SUBCOMMITTEE ON ADMINISTRATIVE LAW & GOVT. RELATIONS

MR. CHAIRMAN, I APPRECIATE YOUR HOLDING THESE HEARINGS THIS MORNING AND SO QUICKLY RESPONDING TO A PROBLEM WHICH WAS CREATED THROUGH THE PASSAGE OF THE ETHICS REFORM ACT OF 1989. I BELIEVE THAT THE BI-PARTISAN SUPPORT FOR THESE HEARINGS AND THE LIST OF BILLS THAT HAVE BEEN INTRODUCED FOR CONSIDERATION THIS MORNING ALL SPEAK TO RESOLVING WHAT CLEARLY WAS AN UNINTENDED PROBLEM.

I AM PLEASED TO APPEAR HERE WITH OTHER MEMBERS, ESPECIALLY MY COLLEAGUE FROM MARYLAND, CONNIE MORELLA, AND JIM HANSEN AND JOHN RHODES. TOGETHER WITH THE CHAIRMAN, WE ARE WORKING ON BEHALF OF FEDERAL EMPLOYEES IN SUPPORT OF LEGISLATION WHICH WILL CORRECT THIS SITUATION.

MR. CHAIRMAN, THE ISSUE IS QUITE SIMPLE. AS PASSED, THE ETHICS REFORM ACT IMPOSED A BAN ON ANY HONORARIA FOR ALL GOVERNMENT EMPLOYEES IN THE THREE BRANCHES OF GOVERNMENT. THE PROBLEM ARISES IN THAT THE ACT ALSO BANNED HONORARIA OR PAYMENTS, EVEN IF THEY WERE TOTALLY UNRELATED TO THE EMPLOYEE'S DUTIES. SIMPLY PUT, THIS MEANS THAT GOVERNMENT EMPLOYEES MAY NOT RECEIVE ANY OUTSIDE INCOME, EVEN IF THAT INCOME WAS FROM PROVIDING CHURCH SERVICES, WRITING POETRY OR BOOK REVIEWS, PERFORMING MUSICAL CONCERTS, OR LECTURING ON FAVORITE HOBBIES OR TOPICS OF EXPERTISE, SUCH AS THE CIVIL WAR.

CLEARLY, ITEMS SUCH AS THESE, IF THEY ARE TOTALLY UNRELATED TO THE EMPLOYEE'S DUTIES, SHOULD NOT BE SUBJECT TO A BAN ON PAYMENT. IF WE DO NOT CORRECT THIS SITUATION, MANY OF OUR MOST TALENTED GOVERNMENT EMPLOYEES MAY CHOOSE TO LEAVE GOVERNMENT SERVICE RATHER THAN REMAIN AND BE SUBJECT TO THIS UNREASONABLE RESTRICTION.

CHAIRMAN FRANK'S BILL CORRECTS THIS ISSUE, AS DO ALL OF THE BILLS UNDER CONSIDERATION TODAY. BUT I BELIEVE THAT THE CHAIRMAN'S APPROACH IS THE MOST APPROPRIATE, IN THAT IT WOULD EXEMPT ALL EMPLOYEES, EVEN SENIOR EXECUTIVES, FROM THE HONORARIA BAN FOR UNRELATED INCOME AND CONTINUE THE BAN FOR MEMBERS OF CONGRESS AND POLITICAL APPOINTEES. THIS STRIKES THE BEST BALANCE OF ALL THE BILLS. IT IS APPROPRIATE TO CONTINUE THE BAN FOR ALL OUTSIDE HONORARIA FOR MEMBERS AND POLITICAL APPOINTEES, IN THAT, BY THEIR VERY POSITIONS, IT IS NEARLY IMPOSSIBLE TO IDENTIFY INCOME WHICH WOULD BE TOTALLY UNRELATED TO THEIR STATUS OR PERFORMANCE OF DUTIES.

I WILL HAPPILY SUPPORT THE APPROACH THAT THIS SUBCOMMITTEE DECIDES TO TAKE AND ASK THAT I BE INCLUDED AS A COSPONSOR OF H.R. 325, THE LEGISLATION WHICH CHAIRMAN FRANK HAS INTRODUCED.

AGAIN, THANK YOU FOR YOUR QUICK ACTION AND I LOOK FORWARD TO HELPING YOU DEFEND THIS BILL ON THE FLOOR IN THE NEAR FUTURE.

Mr. FRANK. Mr. Rhodes.

STATEMENT OF HON. JOHN J. RHODES III, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. RHODES. Thank you, Mr. Chairman. I am advised by my staff that before I came in you did not wish us to waste time by gratuitous thanks to you for all the work that you've done, et cetera, et cetera, so I shall not do so.

Mr. FRANK. That didn't apply to members.

[Laughter.]

Mr. HOYER. It was a good admonition, though.

Mr. RHODES. The problem that we're trying to face was brought to my attention by a constituent of mine in Tempe, AZ, a lady named Marion Durham, who is a GS–7 office manager for the U.S. Forest Service. She is a somewhat recognized amateur geneologist and archeologist. She has published rather frequently and is rather well-known as an amateur geneologist and archeologist. She has received remuneration in the past for her work. As of the first of January, she is now an "outlaw" if she continues to pursue those activities.

Now, I don't think that anybody here really intended that consequence when we passed the Ethics Reform Act of 1989. I think we're all here for the purpose of seeing to it that we can correct those situations.

I happen to be a strong supporter of Mr. Frank's bill, except for those portions of it that differ from mine, in which case I happen to be a strong supporter of my bill. The two of us have approached this issue from basically similar angles. My bill does have a ceiling under which Federal employees would be able to continue to accept fees and honoraria for outside activities not related to their business. We do, as opposed to the Morella and Hansen bills, have a $2,000 limit per event. We all four, of course, in one way or another say that the topics being addressed must be unrelated to the employment. I believe the Frank bill and the Rhodes bill are more clear, that also the parties paying the honoraria must have no interest in the individual's Federal duties. I believe that's an extremely important provision. And both the Frank and Rhodes bill do require disclosure for those honoraria which are accepted.

I believe that having a ceiling is important. Regardless of how we define the ceiling, mine is the equivalent of a former GS–16 level. I think that is an important feature.

One thing, Mr. Chairman, that you and I missed in our bills, that was picked up by the Morella and Hansen bills, and is important, is that this legislation should be retroactive to the 1st of January of this year. I think we create a gray area for those who may have contractually obligated themselves and we should modify our provisions to see to it that the legislation is retroactive to that point.

I will not thank you for your prompt action on this measure, but I'm sure quite a few people who will be covered by this measure will thank you.

Mr. FRANK. Thank you, Mr. Rhodes.

[The prepared statement of Mr. Rhodes follows:]

TESTIMONY
of
THE HONORABLE JOHN J. RHODES, III
First District - Arizona

Before the
Subcommittee on Administrative Law
and
Governmental Relations
House Committee on the Judiciary

Regarding
Bills to amend the Ethics in Government Act to allow certain federal employees to accept honoraria.

February 7, 1991

MR. CHAIRMAN, thank you for the opportunity to testify today on my bill, H.R. 414, and similar bills to correct what was, at least in my view, an unintentional result of the Ethics Reform Act of 1989. Your leadership is important to moving this legislation, and I commend you for acting quickly. I also congratulate my other colleagues who have introduced similar bills.

I won't take long; I have just a few points to make.

The four bills that have been introduced have a common goal -- that is to allow at least rank and file federal employees their rightful opportunity to earn extra income from unrelated activities on their own time. The provision in the 1989 Ethics Reform Act that prohibits them from doing so, was brought to my attention last year by one of my constituents, Mrs. Marion Durham, of Tempe, Arizona.

Mrs. Durham is a GS-7 office manager with the U.S. Forest Service. She has an income producing outside writing interest in archeology and genealogy. As of January 1, 1991, she and other federal civil servants in her position are considered law breakers if they are paid from such outside activities and are subject to a fine of up to $10,000. When we voted in 1989 to end honoraria for ourselves, I at least did not intend to deny rank and file federal employees like Mrs. Durham the opportunity to receive outside income from writings unrelated to their federal employment.

We need to correct that problem as soon as possible. That is the basic thrust of all the legislation pending before the Subcommittee.

While all four bills agree on that, they differ somewhat as to what other federal employees should be included in the exemption from the honoraria ban. Should we exempt all federal civil servants and members of the military, or should

there be a threshold above which the honoraria ban would continue? Do we include all or some employeee of the Houee of Representatives?

Let me make three pointe:

First, my bill would set a threshold of a GS-16 pay grade for federal employees. Above that, the ban on any honoraria would continue. According to the Office of Government Ethics, Executive Branch honoraria rules in place prior to passage of the Ethics Reform Act eseentially prohibited the receipt of all honoraria for most federal employees above GS-16. Although the Congress eliminated the GS-16 pay grade last year in the Pay Reform Act, my preference would be to continue the honoraria prohibition at and above an equivalent pay level for eenior federal employees who are generally in a policy making position.

Second, the intent of my bill was to not include employees of the House of Representativee in the exemption. I am told that technically the bill language doee not totally achieve that. I have no really strong feelings about that. My concern at the time of introduction was only that if we were to provide an exemption for employees of the House, there could be a misunderstanding on the part of the public as to exactly who we are exempting. However, if the Committee decidee to allow House employees to accept honoraria, it might be appropriate to consider a senior staff threshold above which receipt of any honoraria would be prohibited, just ae I euggest for eenior federal civil servants.

Finally, and most importantly, regardless of whether the Committee decides to provide an honoraria ban exemption for some or all federal civil servants, some or all membere of the military, or eome or all employees of the House of Representatives, it is crucial that we retain the honoraria source and related reetrictions contained in most of the bills.

In addition to the $2,000 per event limit, and the requirement that the outside appearance, writing or speech be unrelated to the individual's federal employment, I believe it is especially important that we retain the language requiring that the party paying the honoraria "has no interests that may be eubetantially affected by the performance or non-performance of that individual's official dutiee." That is a crucial safeguard that I believe must be part of whatever legielation the Committee reports.

Also, when the Committee reports a bill, it should be retroactive to January 1, 1991.

Again, I thank the Chairman for holding this hearing. My hope is this Committee and the other Committees of jurisdiction will act promptly to perfect and move this legislation, so Mrs. Durham and others in her situation may once again legally earn outside income through writings, appearances or speeches unrelated to their federal duties.

Thanks again for the opportunity to appear before you today.

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Mr. FRANK. Let me say I agree with you fully on the retroactivity. One thing on the conflict of interest, as I have been trying to refine my own thinking—and I throw this out so that people will have a sense of where at least I'm going and we can react together—it seems to me that the problem with conflict of interest, in my version of the bill I think I stressed subject matter too much. It seems to me that conflict of interest is a matter of the payor rather than the subject matter, that where there's a conflict, it has to do with who is paying you. If it's someone who regulates you, we've got a problem; if it's not someone who regulates you, the fact that this is a matter of your expertise does not, on the surface, give me a problem. But that's the area we want to move in.

Any questions for our colleagues? We have been joined by Mr. Schiff. Mr. Gekas.

Mr. GEKAS. Yes, I do have some questions.

Already, even before we went into banning honoraria, there were certain areas, as I understand, where Federal employees were restricted from outside earnings of different types. I'm wondering, what is the real difference if we are already placing restrictions on outside income? I'm not sure if I can give you an example right now, but I think there are such restrictions.

Why not remove those restrictions, too, and let them moonlight all over the place? Connie was saying it's unfair to restrict Melville from moonlighting into authorship of masterpieces, which I guess no one can really argue with.

But at the same time, if there is in the law already—and we've got to dig this out for the benefit of the committee—other restrictions already on Federal employees on outside income, then we have got to analyze that, too. Does that constitute a conflict of interest? Were those banned by what we did or not? Does anybody know anything about that?

Mrs. MORELLA. You will probably have expert testimony on what currently is banned, but my knowledge is that one cannot now go out and be paid for speaking about something that deals professionally with their work. I don't know whether that——

Mr. GEKAS. I understand. But what if an individual is able to go to work part time for another entity outside of the Government? We allow that now, don't we?

Mr. HOYER. Yes. I don't know the specific rules and, therefore, don't want to comment. I would have to look and see the example and then comment on it.

But obviously, you have two things you want to preclude an employee from doing. You want to preclude them from working in another job that adversely affects the time that they owe to the Federal Government, be it full time, part time, whatever their constraints are and what the responsibilities and duties are, from that being diminished in any way.

Second, you want to preclude them from having their judgment, which they owe to the American public as a Federal employee, modified or affected in any way by an outside payment. Those are two objectives.

What we did was, without making those two judgments, we just broadly prohibited this—there are existing rules. Frankly, I think Connie and I probably represent as many Federal employees as

most. I have not gotten any complaints that I can think of—I have some staff here—until we passed this broad proscription without relevance or attention to those two criteria. It seems to me that those that exist that affect those two criteria are legitimate and ought to be kept in place. As I said in my very brief testimony, the problem is it is easier to say that than it is to define it. That is, the conflict question. But that would be my thought, that really the criteria you're looking at are those two. Beyond that, a Federal employee or any other kind of employee ought to be able to exercise their talents, whether they be Herman Melville—and I may disagree with John in this case—whether they earn——

For instance, Tom Clancey, if he were an employee and not using Federal Government information—Heaven knows where he gets all his information; he knows more than, I'm sure, the CIA and NSA combined. They consult him to find out what's going on. Nevertheless, if he can write that book on the weekends and at night——

Mr. FRANK. It's arm's length, copyright royalties.

Mr. HOYER. Yes, I understand that. But if he had some other talent that was affected, or let's say he was just a brilliant weekend speaker, one of the greatest speakers in the country, and people just like to hear him, and he didn't speak about his business; he was just an entertaining speaker—he was Mark Russell, who is a Federal employee.

Now, one would say he's not going to remain a Federal employee very long because he can make millions on the weekends and he's going to quit the Federal Government. Maybe, maybe not. The point is not whether he chooses to do that or not do that; the point is, does it conflict with the performance of his duties and his judgment. That is the criteria.

In this legislation that we passed, we did not apply that criteria. We applied an across the board, meat ax, and it's "all got to be eliminated" philosophy.

Mr. GEKAS. All I'm saying is that we owe it to ourselves to check into what impact outside earnings, period, has.

Mr. HOYER. I agree.

Mr. FRANK. I thank the gentleman.

I have asked the staff—and we can work on this together—to pull together and circulate to all the members before the markup any other restrictions that are in existence, either regulation or statute, so that we will have a sense of that.

Mr. Reed.

Mr. REED. No questions.

Mr. FRANK. Mr. Schiff.

Mr. SCHIFF. Mr. Chairman, I have no questions. May I have you leave to make a 1-minute observation on the testimony?

Mr. FRANK. Yes. Go ahead.

Mr. SCHIFF. I just appreciate what the members said about stating the problem and identifying it case-by-case are two different things. To say, "well, we will allow the honoraria to be accepted where there's no conflict of interest or appearance of conflict of interest, and where there is, we won't allow it" is a good statement. Defining that and identifying that case-by-case is very difficult.

I just want to observe that, from what I've heard of this matter and what I've learned of it, I think we did overlegislate. And I will

support a bill that will alter that. I want to make that very clear. But I also want to make very clear that whenever public employees are receiving funds from private sources, it raises a matter of concern that I think should be continually monitored by the Congress.

Thank you, Mr. Chairman.

Mr. FRANK. Mr. Ramstad.

Mr. RAMSTAD. I have no questions, Mr. Chairman.

Mr. FRANK. Mr. Mazzoli has no questions. We thank our colleagues and look forward to working with them. They are dismissed.

[The prepared statement of Messrs. Hansen and McMillen follows:]

TESTIMONY OF THE HON. JAMES V. HANSEN

BEFORE THE SUBCOMMITTEE ON

ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

FEBRUARY 7, 1991

Mr. Chairman, Members of the Committee, thank you for this opportunity allowing me to submit testimony.

Last summer I was approached by Bill C. Self, a federal employee and constituent from Ogden, Utah, located in my Congressional district. Mr. Self was very concerned about the effects upon federal employees of passage of the 1989 Ethics Reform Act, specifically the "honoraria ban" provision.

Mr. Self is employed as a GS-12 Regional Dams and Hydraulics Engineer with the U.S. Forest Service. In his spare time, he participates in freelance writing and speaking. His activities include writing magazine articles, contributing to Sports Guide magazine, and editing for Alpine Ski. He also teaches continuing education courses for the Ogden and Bonneville school districts in Utah and is under contract with a literary agency.

These activities have provided supplemental income for Mr. Self, as well as a sense of pride and self-satisfaction. But, no more -- in our attempts to limit honoraria for Members of the House, we have made it illegal for Mr. Self to receive pay for his freelance writing and speaking.

As a ten-year Member of the House Committee on Standards of Official Conduct (the Ethics Committee), I was there with Hon. Jerry Lewis and Hon. Tony Coehlo when the hearings and investigation for the first Ethics Reform package were held. I know that this ban on speaking and writing for pay which is now being imposed upon all federal employees, from janitors to senior managers, was never the intention of this legislation.

I have introduced legislation, H.R. 474, which will clarify the honoraria ban and allow speeches, appearances, and articles by officers and employees of the United States if unrelated to that individual's official duties or status. I believe that my legislation will rectify the mistake which we have unjustly inflicted upon federal employees. Let's act on this now. Thank you for your consideration of this matter.

TESTIMONY BY THE HONORABLE C. THOMAS McMILLEN FOR THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENT RELATIONS. FEBRUARY 7, 1991.

MR. CHAIRMAN:

I want to commend Chairman Frank for introducing H.R. 325 and for working to remedy an unforeseen problem which arose from the language of the Ethics Reform Act of 1989.

In drafting the honoraria-ban provisions of the Ethics Reform Act of 1989, Congress used language that has been construed to prevent federal employees from speaking or writing on non-governmental topics. HR 325, of which I am a cosponsor, will rectify this problem. This bill will amend the honoraria ban to allow government employees to receive payment for activities that are totally unrelated to their official duties.

Specifically, an honorarium could be accepted under this bill if: 1) the subject of the speech, appearance, or article and the reason the honorarium is paid is unrelated to the employee's duties or status; and (2) the source of the honorarium has no interests that may be substantially affected by the employee's performance of his official duties. The amount of any such honorarium may not exceed $2,000, the same limit that prior law applied to all government officers and employees for any single speech or article.

The bill would make no change in the honoraria ban for Members of the House, judges, and presidential appointees subject to Senate confirmation who will continue to be barred from accepting honoraria under any circumstances. I am supportive of such efforts to remove this unintentional prohibition on outside income for our federal employees as quickly as possible. In short, HR 325 will provide an outside source of income and an avenue for federal employees to pursue intellectual, community, artistic, or other interests un-related to their work, and keep in place the restrictions on outside income for certain employees and elected officials that were explicit in the Ethics Reform Act of 1989.

For the federal workers in the 4th District of Maryland and for all federal employees that will be affected by HR 325, the repeal of the ban on honoraria will dramatically augment their participation in the cultural and intellectual pursuits of life. In conclusion, I strongly urge the expedited passage of this bill.

Thank you.

Tom McMillen

Mr. FRANK. Next we will hear from Mr. Potts who is the Director of the Office of Government Ethics.

While he's coming forward, I ask unanimous consent to put into the record statements from the ACLU, the Association of the United States Army, the Association of Professors of Medicine, and the Association of American Medical Colleges, in favor of the general thrust of legislation.

Is there objection? The Chair hears none.

[The prepared statements follow:]

PREPARED STATEMENT OF LESLIE HARRIS, CHIEF LEGISLATIVE COUNSEL, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

INTRODUCTION

The American Civil Liberties Union appreciates the opportunity to submit testimony on the honoraria provision of the Ethics Reform Act of 1989. The American Civil Liberties Union is an organization of over 275,000 members dedicated to the defense of civil liberties. Because the First Amendment lies at the heart of our mission, we view with caution - if not alarm - sweeping "government reform" measures that trample on First Amendment rights. Unhappily, it is apparent to us that those interest groups who frame the so-called "good government" agenda accord very little weight, if any, to First Amendment interests in shaping public policy. Whether the debate involves Hatch Act reform, post-employment lobbying restrictions, or as this hearing will explore, the receipt of honoraria, the same question is presented: Is ethical government service incompatible with First Amendment rights; or is there a balance that can be struck between free expression and the preservation of government integrity? The ACLU has no doubt that these interests can be reconciled but doing so requires taking both sets of interest equally seriously. H.R. 325 in a important step to that end.

As the Committee may know, the ACLU has filed a lawsuit on behalf of 10 federal employees challenging application of Title VI § 501(b) to honoraria received for First Amendment activities

that are unrelated to federal service. Crane et al. v. United States of America, Civil No. 90-3044 (D.Ct. D.C.). The allegations in that case are straightforward. As I set forth in more detail below, we contend that the honoraria provision as applied to these plaintiffs (and by implication to all federal workers similarly situated) directly and substantially burdens free speech; that deprivation of the right to receive renumeration is itself a direct burden on the speech; that no government interest has been asserted that can plausibly justify the broad restriction on compensated activities; and that in any event, the statute is not narrowly drawn to protect the legitimate interest the government has in preventing corruption. In addition, we challenge the statute on vagueness grounds, a particular vice in First Amendment cases.

Before I turn to our view of the law, I'd like to briefly describe some of the plaintiffs that the ACLU is representing in this matter. Their stories stand as a powerful rebuttal to those who view the federal workforce through a distorted lens. Where some find only the opportunity for scandal, corruption and evil, we find a yearning for free expression and self fulfillment. (The Committee has been provided a copy of the formal affidavits of the plaintiffs in Crane v. et al. United States).

Peter G. Crane is a lawyer at the Nuclear Regulatory Commission in Rockville. On his own time, he has extensively researched the efforts of the Czarist government of Russia in the 1890s to model that country's economy after the economy of the United States. He plans to write an

article for publication on this subject and to be paid for it. In addition, he is preparing to write for publication an article based on his great grandfather's extensive interview with Leo Tolstoy in 1898.

William H. Feyer works for the U.S. Department of Labor in New York. He currently handles applications for the certification of sheltered workshops and patient worker programs. Feyer is also an ordained rabbi. During non-working hours, he travels extensively delivering lectures, teaching classes, and leading seminars at churches, synagogues, and other spiritual centers. Feyer is paid for his rabbinic activities.

Judith Lynne Hanna is an Education Program Specialist at the U.S. Department of Education in Washington, D.C. She holds a Ph.D. in anthropology. She has written six books and more than 75 articles, and has lectured extensively in the fields of anthropology, ethnomusicology, dance ethnology, racial tension, and gender. She normally receives a fee for her articles and lectures.

George Jackson, Ph.D., is a microbiologist for the Food and Drug Administration in Washington, D.C. He also writes dance reviews for the Washington Post and Dance Magazine, and lectures on dance for universities and theatre audiences. He is paid for his articles on a per piece basis, and is paid for some (though not all) of his lectures.

Seledia Shepard is an Education Program Specialist at the U.S. Department of Education in Washington, D.C. On her time away from work, she creates and sells greeting cards and personalized photo albums. She is unclear about whether this outside activity will be prohibited by the honorarium statute. Neither the ethics division of her agency nor the Office of Government Ethics has been able to give her a definitive answer. She would like to continue creating and selling greeting cards and photo albums in 1991, but she does not want to risk incurring a $10,000 fine.

Robert N. Spore is a budget officer at the National Security Agency in the Washington, D.C. area. Since 1972, he has also published articles on fishing, hunting, and environmental issues that affect these outdoor activities. He currently writes two articles per week for the Baltimore Sun. He also gives speeches on the topics of his articles. He is paid for both his articles and speaking engagements and depends upon the income he receives.

Each individual I described and most other employees of the federal government are now prohibited from receiving any compensation for these and other laudable First Amendment activities - even though the activity occurs entirely on the employee's own time, does not involve any use of government resources, does not embarrass the government or anyone in the government, does not conflict with the employee's duties or responsibilities, and does not affect in the slightest way any known interest of the government.

There can be no doubt that this law has diminished the marketplace of ideas by effectively silencing over four million voices; the harm that has been done to the First Amendment must be remedied now. We regret that efforts by the Chairman and members of this Committee to amend the statute in the closing days of the last Congress were unavailing; but there is still time to limit the damage by moving a bill expeditiously through Congress.

I will now turn my attention to the honoraria statute. First, I will discuss the statute and the implementing regulations. Then I will set forth our constitutional objections in somewhat more detail. Finally, I will offer our views on H.R. 325.

The Statute

The statute before the Committee is but a small portion of Title VI of the "Ethics Reform Act of 1989," Pub. L. 101-194, 103 Stat. 1716, 1760-63 (November 30, 1989), as amended by Section 7 of Pub. L. 101-280, 104 Stat. 149, 161 (May 4, 1990).[1]

There are two critical definitions in the statute: First, an "officer or employee" is defined to mean "any officer or employee of the Government except" Senate employees and "any special Government employee" (as defined in 18 U.S.C. § 202). 5 U.S.C. § 505(2). Second, the term "honorarium" is defined to mean "a payment of money or any thing of value for an appearance, speech or article" that is made or given or written by a Member of the House or an "officer or employee," but excluding payment of travel and related expenses. 5 U.S.C. § 505(3).

Simply stated, the honoraria statue makes it unlawful for Members of the House and almost every government employee to receive compensation for making any "appearance," giving any "speech," or writing any "article," whether or not the activity is in any way related to the individual's job.

[1]The honoraria statute provides that "[a]n individual may not receive any honorarium while that individual is a member, officer or employee." 5 U.S.C. § 501(b).

The statute itself provides no guidance on what activities will be prohibited, leaving implementation to rules and regulations to be promulgated by the Office of Government Ethics. 5 U.S.C. § 503(2). On November 28, 1990, O.G.E. issued a "Memorandum" which proported to provide "initial guidance regarding the application of" the honoraria statute with the understanding that implementing regulations "will be consistent in all respects" with the Memorandum. Interim regulations were promulgated on January 17, 1991 (56 Fed. Reg. § 1721-30).

A review of the regulations provides fresh meaning to the term "chilling effect." For even as Office of Government Ethics seeks to limit the draconian reach of the law, that effort falls prey to the complexity - if not the futility - of the task. In the end, the regulations leads the employee through a tortured web of content based rules and exceptions that defy logic and offer little guidance. Obscure distinctions are made between appearances which are based on an artistic or other such "skill or talent" and those which are not. Lines are drawn between prohibited activities and permitted ones that give lie to the rationality of the law. Examples are provided which can only further bewilder the would-be writer or performer.[2] Indeed, it

[2]One example which perhaps best illustrates the absurdity of the regulations suggests that an employee may receive an honorarium for performing a comedy routine at a dinner theater, but runs afoul of the law if he or she uses the same material to deliver an amusing speech to a conference audience.

is difficult to articulate a government interest which is forwarded by rules which appear to prohibit the receipt of honoraria for dance reviews, but to permit it if those reviews are written in iambic pentameter. Most troubling, the regulations appear to require the Office of Government Ethics to impermissibly engage in content assessment and to stand as the final arbiter of artistic merit.

The employee considering exercising his or her First Amendment rights is faced with severe sanctions for violating the honoraria ban. The Attorney General may bring a civil action against any individual who violates the ban, and the court may assess a civil penalty of $10,000 or the amount of compensation the individual received, whichever is greater. 5 U.S.C. §§ 501, 504(a). In addition, the regulations authorize the agency to initiate disciplinary action against the employee which may include suspension, demotion or removal. § 2636.104

And yet proponents of the honoraria ban boldly insist that the restrictions at issue "do not block anyone from speaking" and argue further that "(any) termination of expressive activity in response to the honoraria ban will be self imposed."[3] (emphasis added). Surely this is news to Georgs Jackson who has now been

[3]Brief of Common Cause as Amicus Curiae in opposition to appellants' emergency motion for preliminary injunctive relief at 10.

informed by the Washington Post that it is not sure whether it will accept his donated dance reviews. Such statements belie any understanding of the fragility of the First Amendment or its centrality in our constitutional system.

The Honoraria Statute Is A Restriction on Speech

Much has been made by the proponents of this law of the fact that it prohibits compensation rather than speech. As they see it, that fact constitutes the beginning and the end of the constitutional analysis. But it is well "settled that the denial of payment for expressive activity constitutes a direct burden on that activity." Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781 (2d Cir. 1990) (citing Meyer v. Grant, 486 U.S. 414, 422-423 (1988)).[4]

Moreover, the fact that a speech is dependent upon payment does not in any way affect the scrutiny that such law a must survive. "This Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment." Buckley v. Valeo, 424 U.S. 1,

[4]The ACLU wishes to acknowledge the law firm of Covington and Burling which prepared the brief in Crane et al. v. United States from which this legal analysis is drawn.

16 (1978) (citing Bigelow v. Virginia, 421 U.S. 809, 820 (1975); New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

The Supreme Court has rejected in various instances the argument that laws restricting payments for speech are only economic regulations that at best have incidental First Amendment impact. See, e.g., Riley v. National Federation of the Blind, 108 S.Ct. 2667, 2673-74 (1988); Secretary of St. of Md. v. Joseph H. Munson Co., 467 U.S. 947, 967 n.16 (1984); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 n.23 (1978).

In Meyer v. Grant, supra, the Court held that a prohibition against paying circulators of petitions was a First Amendment violation. Meyer makes clear the obvious point that a restriction on payment for speech will have the necessary effect of reducing speech. See Riley v. National Federation of the Blind, supra, 108 S.Ct. at 2676 (holding that restrictions on fundraising "must necessarily chill speech in direct contravention of the First Amendment dictates"). Given that the honoraria statute will necessarily reduce speech, it is clear that the restrictions are a burden on the speech and must be scrutinized as such.

The recognition in Riley, Buckley, and Meyer that restricting payment for an activity will deter people from engaging in that activity is not surprising: The Supreme Court

has long held that the incentive of economic gain is the engine that drives free expression. See, e.g., Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985) ("[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas"); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (promise of personal gain "motivate[s] the creative activity of authors"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . ."). See also Simon & Schuster, supra, 916 F.2d at 781 ("Without a financial incentive . . . , most would-be storytellers will decline to speak or write.")

These cases simply echo H.L. Mencken's insight that "the impulse to create beauty is rather rare in literary men . . . far ahead of it comes the yearning to make money," Samuel Johnson's dictum that "no man but a blockhead ever wrote except for money," and Thomas MaCauley's recognition that "It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated . . . . "[5]

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[5]B. Stevenson, Homebook of Quotations at 2250 (Greenwich House) (10th ed. 1984), quoting Mencken, Prejudice, Series V, at 189, and Boswell, Life of Samuel Johnson (1776); MaCauley, Copyright (1941 speech in House of Commons), in 8 Works (Trevelay) ed. 1879) at 195, 197.

Surely it would make a mockery of the First Amendment to hold that Congress is free to pass a law that authors and composers and members of the clergy cannot be paid for their work.

There Is No Substantial Government Interest That Can Justify the Restriction

We are confident that the honoraria law cannot withstand constitutional scrutiny whether measured against the "strict scrutiny" test, under which the government must show a "compelling interest" or under the somewhat less stringent test that the Court has at times applied to government employees in instances where the Government "has an interest as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 569 (1968). Under that test:

> the restrictions on the speech of government employees must 'protect a substantial government interest unrelated to the suppression of free speech'. . . . [and] the restriction must be narrowly drawn to 'restrict speech no more that is necessary to protect the substantial government interest.

McGehee v. Casey, 718 F.2d 1137, 1142-42 (D.C. Cir. 1983 (quoting Brown v. Glines, 444 U.S. 348, 354-55 (1980)).

This "substantial interest" scrutiny enables the court to "arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 569.

The Supreme Court has flatly declared that the touchstone of the balancing process in cases involving restrictions on government employees' speech is "the effective functioning of the public employer's enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1978). Thus, the Court has "recognized as pertinent considerations" whether the statement sought to be restricted:

> "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."

Id.

To be sure, the ACLU has disagreed with many of the cases where the Court has employed this test to uphold restrictions on the speech of government employees including the Hatch Act which has been cited by proponents as ample precedent for the honoraria ban. United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973).

But even accspting arguendo the analyeis in that caes, there ie no way to conclude that the speech activities at iesue here "would by . . . (their) very nature corrupt our basic institutions . . . " National Treasury Emp. Union v. Fasser, 428 F.Supp. 295, 299 (D.D.C. 1976), impair discipline by euperiors, affsct harmony among co-worksrs, undsrmine loyalty and confidence or impede the performance of duties.[6]

The absencs of all of thess featurss make clear that the speech that ie restricted by the honoraria statute doee not in any way detract from the "effective functioning of the public employer's enterpriee." In short, there ie no governmsnt interest here that juetifiee the sweeping reetrictione the statute impoeee.

The Honoraria Statute Is Not Narrowly Drawn To Protect Only Such Interest the Government May Legitimately Have In Restricting the Speech of its Employees So As To Prevent Corruption Or Even the Appearance of Corruption

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[6]Morsover, in the Hatch Act case the Court had bsfore it a subetantial hietorical record of corruption linked to the political activities at issue. Thsre ie no such rscord of corruption here. To the extent that any record exists, it is sntirely baeed on the receipt of honoraria by msmbers of Congress. The danger poeed by the receipt of honoraria in the reet of the federal workforce "remains a hypothetical poseibility and nothing more." F.E.C. v. Nat'l Right to Work Committee, 470 U.S. 480, 501 (1988).

We do not suggest that no legitimate government interest may be asserted in limiting some types of honoraria. The Bipartisan Task Force that gave birth to the Act has identified an interest in assuring that honoraria paid to officials not be a camouflage for efforts to gain an official's favor and it may well be that a narrowly tailored statute could be drawn to protect that interest. But the interest in government integrity - however important - is not a talisman which by mere assertion defeats the First Amendment. "If the State has open to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." Kusper v. Pontikes, 414 U.S. 51, 58 (1973).

These words have special force here. The Task Force may well have identified a problem that requires effective government action. But prohibiting a government microbiologist from receiving modest compensation for writing dance reviews or a budget officer from writing about fishing is surely not the remedy for the kind of corruption that the Task Force identified. Congress simply must do better than this.

The Honoraria Statute Is Unconstitutionally Vague

Finally, the honoraria statute is also impermissible vague. The Supreme Court has clearly established that as a matter of due

process a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess as its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

The Supreme Court has also made it clear that the void for vagueness doctrine demands a "greater degree of specificity" in First Amendment situations. Smith v. Goguen, 415 U.S. 566, 573 (1974). This is so because "[t]hose . . . sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may no be so inhibited." Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

H.R. 325 a Bill to Amend the Ethics in Government Act to Modify the Rule Prohibiting the Receipt of Honoraria

H.R. 325 provides a simple and straightforward solution for the problems created by the Ethics Reform Act of 1989. Under its terms, all federal employees both career and non-career, except for Members of the House, judges and Presidential appointees employees would be subject to a limited honoraria ban for speeches, articles and appearances. No honorarium will be allowed if either the subject of the speech, article or appearance is related to official duties or status, or if the source of the honorarium has an interest that may be

"substantially affected by the performance or non-performance" of those duties. We believe that two prong test more than adequately safeguards whatever interest the government may have in preventing corruption. Thus, we fully endorse the bill's treatment of these employees, provided that a definition of "related" be adopted which tracks to the extent possible the prior practice of the Office of Government Ethics.

The lines drawn for limiting honoraria by H.R. 325 are far preferable to those in the principal Senate bill, S.242 introduced by Sens. Glenn (D-Ohio) and Roth (R-Del.) which subjects senior non-career employees to an absolute ban on receipt of honoraria. We think that line makes no constitutional sense. While the ACLU has long recognized that some very senior political appointees may by the very nature of their positions be subject to more First Amendment restrictions than other federal employees, non-career status is not coextensive with political appointment nor is pay grade an appropriate measure of personal liberty. For the vast majority of non-career employees, the two prong test set forth in H.R. 325 should more than assure that the government's interests are protected. To be sure, as an employee's responsibilities increase there may well be fewer opportunities for compensated First Amendment activities that are unrelated to "official duties" or "status"; just as there may be fewer sources of honoraria that are unaffected by those duties. But to the extent that those opportunities survive scrutiny under

the test, we can see no constitutional way to make a distinction.

If some absolute cut off of honoraria is appropriate for top level Executive Branch employees, then the formulation in H.R. 325 presents a more tailored approach than S.242. While we are not in a position to endorse any special restrictions on Executive Branch officials, we think the Frank bill draws a more appropriate line than the Senate bill.

The ACLU has not yet reached a final verdict with respect to question of banning honoraria for Members of Congress. For all the reasons I have previously stated, we do think an absolute honoraria ban raises substantial civil liberties concerns. Members of Congress do not lose their right to free speech upon election and there is no doubt that the ban works a direct and substantial burden on that right. On the other hand, The Union is mindful that there is a substantial government interest in protecting the legislative process and that Members are unique in that process because they may be called on to vote on a wide range of matters and hence may be seem to be improperly influenced by receipt of honoraria. We are currently examining where that line ought to be drawn in order to assure that Members' First Amendment rights are properly protected and that the people's right to petition the government is not diminished. We are not prepared to say at this time whether or not the line Congress has drawn for itself is the right one.

I do want to address the question of whether federal employees who are offered honoraria for protected First Amendment activities unrelated to federal service should be required to obtain prior approval from the Office of Government Ethics. We understand that several subcommittee members raised the idea at the hearing and Common Cause indicated that it would be supportive of such a scheme. The ACLU believes that a requirement of prior approval would constitute an unconstitutional prior restraint and must be rejected. It is well settled that "prior restraints on speech and publication are the most serious and least tolerable infringements on First Amendment Rights." Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976). It is obvious that pre-publication and pre-speech restraints have a greater chilling effect upon speakers than post-speech sanctions. Federal employees faced with review of their protected activities by the government will be forced to forgo speaking until approval is forthcoming. More to the point, speakers will steer away from any speech that may be controversial or in any way disfavored by reviewers. Moreover, pre-speech or publication decisions are made upon little more than speculation and conjecture unlike post-speech sanctions which may be evaluated in the context of actual events. Such decisions cede too much discretion to the decision maker and therefore suffer the dangers both of abuse of discretion and of

overbreadth, restricting epeech which would - under the law - be entitled to be unfettered.

Finally and perhaps most importantly, prior restraints are objectionable because they shut off communication before it occurs. Such restraints therefore conflict with the basic notion of the marketplace of ideas: that the remedy for injurious speech is more epeech rather than coerced silence. See, New York Times v. United States, 403 U.S. 713, 724 (1971).

Given the overwhelming preeumption againet the validity of prior restraints, it is implausible that a prior approval echeme here would survive a constitutional challenge.[7] Whatever harm may be aseerted by the government by the receipt of illegal honoraria cannot rise to the level of "direct", "immediate", "grave and irreparable" harm to the nation or its people which would overcome that preeumption. See, Nebraska Press supra, at 593 (Brennan, J. concurring). Surely, if the government cannot prevent the publication of the Pentagon Papers, it cannot stop a

[7]The decision in Snepp v. United States, 444 U.S. 507 (1980) which upheld the pre-publication review procedures of the C.I.A. does not provide any authority for a prior approval echeme here. That case - which the ACLU believes was wrongly decided - involved highly sensitive national eecurity information which the employee as an exprese condition of hie employment had eigned an agreement not to write about without pre-publication review by the agency. In addition, the Court found that releaee of that information would cause irreparable harm. Here the information at ieeue is not government information of any kind, there is no national security claim of harm and no contractual obligation for pre-publication review.

federal employee from publishing an article which may arguably violate the honoraria statute.

In any event, it is simply not necessary to wade into such troubling waters. Federal employees contemplating the exercise of their First Amendment rights for compensation will have ample guidance as to what conduct is permissible from the statute and the implementing regulations. Furthermore, if a particular activity falls close to the line, an employee may voluntarily seek guidance from O.G.E. or its agency designee. Finally, the substantial post-speech and publication penalties together with the statute's requirement for confidential disclosure more than assure than federal employees will carefully scrutinize their own conduct.

Conclusion

I'd like to conclude my testimony with a brief observation. No government "reform" measure can absolutely guard against misconduct without the risk of a significant loss of personal liberty. It will always be possible no matter what legislative solution is being considered to devise a hypothetical set of facts where some potential for impropriety or the appearance of impropriety remains. But the temptation to legislate at the margins needs to be resisted. Broad prophalytic rules must be avoided when First Amendment rights are at stake. F.E.C. v.

Nat'l Conserv. Pol. Action Committee, supra, at 498. The goal of reform legislation must be ethical standards not sanitation. At some point, fundamental interests in personal liberty and open government require that we stop legislating and start trusting the integrity and judgement of the federal workforce. Hopefully the uproar over the honoraria ban will serve as a cautionary tale to that end.

PREPARED STATEMENT OF COL. ERIK G. JOHNSON, JR., USA RET., DIRECTOR OF LEGISLATIVE AFFAIRS, ASSOCIATION OF THE UNITED STATES ARMY

A Statement to the

Subcommittee on Administrative Law and Governmental Relations

House Judiciary Committee

Mister Chairman and Members of the Subcommittee:

Thank you for this opportunity to express the views of the Association of the United States Army (AUSA) concerning what we believe to be a particularly onerous provision in the 1989 Ethics Reform Act.

I refer specifically to that provision in the Act which makes illegal the acceptance of any payment for writing or speaking by federal government employees - a group that includes U.S. military commissioned and warrant officers. It is our understanding that it fortunately does not apply to enlisted persons. Retired officers and Department of Defense civilians too are not included in the ban, nor are members of the Reserve or National Guard, unless they are in the full-time employ of the federal government.

AUSA would describe the Ethics Reform Act of 1989 as noble in its intent, reckless in its sweep. Let me tell you why:

This Association publishes a monthly magazine entitled Army. It is an award winning publication that owes its reputation as one of the world's leading journals on military thought to the thousands of military professionals who have contributed to it over the past 40 years. We have paid honoraria to our contributors as an inducement to encourage professional writing, and because we believe it is one of this society's basic rights to be paid for work done.

Our honoraria payments are not large; they vary at the discretion of the editor between 14 and 18 cents per word. This means that our average honorarium for an article is between $200 and $500 depending upon its length. While these sums are modest, certainly no one will ever get rich writing for Army magazine. We believe honoraria serve to encourage writing for publication within the officer corps.

Readers of not only Army magazine but many other professional publications also will be among the losers if this law results in the stifling of desire to share ideas and knowledge with others in print. Writing by active duty military officers for professional journals is an old and honorable practice which has had profound effects on military professionalism, on the way wars are fought and on history.

We are not prepared at this early time to say that the law will stifle writing for publication among the officer corps; the desire to enhance the profession is strong. There are also many other reasons why those in government service put in the many extra hours that such contributions require: a professional desire to enhance their fields by sharing ideas, a motive to educate or a compulsion to create. But we believe strongly that they deserve to get paid, just like the many other contributors whose lots in life are not subject to congressional edict.

Finally, we would like to point out that this provision of the Act discriminates against those who write. A government employee at all but the very highest levels can work at and receive pay for virtually any part-time job he or she chooses as long as it does not violate conflict of interest laws and if done on off-duty time. Why single out those who write, a voca-

tion which can be more grueling, and for the average writer uaually leee lucrative on a per-hour basie than a job at a McDonald'e counter?

AUSA urges you to amend the Ethice Act eo ae to permit honoraria to be accepted by those federal government employeee, which includes military officere, who write for professional publications.

We believe it to be the duty of every member of this body to legielate in a manner that etimulates individual thought and creativity and the desire to ehare knowledge with othere. Until thie ban on honoraria by the Ethice Reform Act ie purged from what is otherwiee a congressional action to be proud of, a great many dedicated people with much to contribute are, becauee they choee careers with the government, being discriminated egsinst because they write and denied one of a free eociety'e basic rights; that of being paid for work done.

PREPARED STATEMENT OF THE ASSOCIATION OF PROFESSORS OF MEDICINE

Mr. Chairman and Members of the Subcommittee:

The Association of Professors of Medicine (APM) appreciates the opportunity to submit testimony on H.R. 325, legislation to remove the prohibition on the receipt of honoraria by most federal employees. We are very supportive of the introduction of this legislation, and will lend all efforts to secure its passage.

The APM represents the 126 chairmen of departments of medicine at U.S. medical schools. Of these schools, 103 are formally affiliated with a Department of Veterans Affairs (VA) Medical Centers. The reasons for the affiliations between medical schools and VA Medical Centers are two-fold: first, the VA is provided with a cadre of high-quality physicians to assist in the care of its patients; second, medical schools are given access to established in-patient facilities to train their graduate physicians. This system has ben in place since the end of World War II, and has resulted in nearly half of all current physicians spending some portion of their training in the VA system.

A key ingredient to making the affiliations a success is replicating the academic atmosphere of the medical schools in the VA training sites. Such an atmosphere improves the attractiveness of the VA, with the opportunities not only to treat patients but to teach and conduct research as well. The academic setting provided by the medical school affiliations is of tremendous value in not only recruiting, but also in retaining top-notch physicians to the VA, and has been a major achievements of the VA-medical schools partnership.

The foundation of the relationship between the VA and academic medicine is the joint appointment of staff at the two institutions. Under this system, all physicians hired by the affiliated VA Medical Center become faculty at the medical school, and likewise to many of the existing faculty from the academic institution receive VA appointments. The idea behind this system is to create a level of professional parity between physicians at the two institutions, and especially to make the physicians at the VA full participants in the academic medical establishment.

The purpose of the affiliations is to have the medical schools assist in providing the highest quality health care services to VA patients. The level of assistance is produced through negotiations between staff of the two institutions, based on a determination of the level of staffing required to meet the VA's patient care need for a given year. For example:

> A VA Medical Center determines it requires 125 FTEs (Full Time Equivalents, or the measure of full-time efforts needed to perform a given task) to fulfill it patient care mission. The budget allocated to the Medical Center allows it to have 25 full-time VA physicians; the remaining 100 FTEs will be made up of part-time VA physicians, who spend the non-VA portion of their time at the medical school or other non-VA affiliated teaching hospital. These physicians will be compensated by both partners in proportion to the amount of time spent at each institution.

In this hypothetical example, the 100 FTEs could be made up of 200 part-time VA physicians, each of whom spends 4/8ths of their time at the VA Medical Center. [The VA expresses its work units in 8ths, which equal approximate 5 hours each. Full-time VA physicians are considered 8/8ths, or spending 40 hours per week at the VA.] In reality, the 100 FTE would most likely consist of a mixture of part-time personnel, ranging from 2/8ths to 7/8ths (part-time VA physicians are paid on a pro-rated basis of the full-time level for their grade).

As mentioned previously, a major factor in the determination of the number of part-time physicians needed is the resources available at a particular VA Medical Center. It is almost always the case that salaries for full-time VA physicians lag behind those of their medical school, and as the affiliations strive to create parity between staff at the two institutions, the medical school departments pay a portion (in some cases a substantial porion) of the part-time VA physicians total compensation. In other words, medical school departmental chairs provide funds over and above the full-time VA rate to keep part-time VA physicians' salaries reasonably equal to their medical school colleagues with no ties to the VA.

Part-time service should in no way be construed as meaning those physicians have any lesser commitment to the VA. They have the same dedication to providing the best medical care services to VA patients as those who serve full-time. If they did not, they would certainly choose to spend their valuable professional time in another setting.

Thus, part-time VA physicians are part-time federal employees, but they serve professionally as full-time medical school faculty, and as such, should be encouraged to fully participate in the academic medical enterprise with the same privileges as their university counterparts who do not serve at the VA. Pillars of this enterprise are the ability pursue academic endeavors such as scholarly publication, service as visiting professors, and presentation of research results.

Over 6,000 part-time academic physicians currently choose to spend a portion of their professional time at VA Medical Centers, despite lower pay and generally less sophisticated working conditions. The prohibition on honoraria that went into effect on January I presents a tremendous disincentive to part-time service at the VA, by creating a two-class environment within the VA-medical school partnership: those without ties to the VA, who can receive honoraria for normal academic activities; and those with ties to the VA who cannot. Reports filtering back to the APWU office since the implementation of the honoraria provision indicate that it is already having a negative impact on the morale of part-time VA physicians. The spirit of many VA physicians is already low because of successive years of chronic underfunding for the medical care and research systems in the

VA; with vacancy rates among physicians already higher than normal at the VA, no further reasons to discontinue service in the VA should be created.

Losses by the VA due to the prohibition on honoraria would have a direct impact on the quality of patient care services delivered to VA patients, because the part-time physicians who participate in activities that involve honoraria are often those with outstanding credentials in their field. These physicians would logically be of greatest interest to outside entities and, moreover, of greatest value to the VA for patient care services.

It should also be noted that the VA has already adopted very strict conflict of interest rules for relationships between its full-time physicians and private concerns. In addition, all VA physicians who have medical school faculty appointments fall under guidelines which virtually all institutions have to prevent unethical behavior by their staff. Thus, even prior to the implementation of the honoraria prohibition, rules to prevent unethical professional conduct by VA physicians were in place.

In sum, the APM believes that the current ban on the receipt of honoraria by part-time VA physicians creates an unneeded and unwarranted division between the partners in the VA-medical school relationship, which in turn, could have a negative impact on the quality of care delivered to VA patients. The Association urges the speedy passage by the Subcommittee, full Committee, and the House of H.R. 325. Please let our staff know how the APM can be most useful to you in this process.

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PREPARED STATEMENT OF THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES

The Association of American Medical Colleges (AAMC) supports H.R. 325, a bill to revise the current prohibition on Federal employees from receiving honoraria. The AAMC appreciates the opportunity to submit testimony on the particular effects of the ban on physicians employed by the Department of Veterans Affairs, Veterans Health Service and Research Administration (VA-VHSRA). VHSRA currently employs over 10,000 physicians, nearly 6,000 of whom serve part-time at the VA as well as on the faculty of a medical school. The implications of the honoraria ban included in Title V of P.L. 101-194 are particularly troubling for this group of physicians.

In fact, the House of Representatives has twice unanimously approved legislation to repeal application of the ban for VHSRA employees. H.R. 598, as passed by the House of January 31, includes language to "provide that a person appointed as an employee of the DVA's Veterans Health Service and Research Administration on either a full or part-time basis may receive and retain amounts (or any other thing of value) paid to that person for an appearance, speech, or article so long as the appearance, speech, or article does not create a conflict of interest or an appearance of a conflict of interest. House Veterans' Affairs Committee Chairman G.V. "Sonny" Montgomery stated on the floor prior to passage, "There is growing recognition that this sweeping prohibition is not warranted. Its impact on VA is likely to be particularly severe. In almost all universities, honoraria and royalties are regarded as both appropriate and desirable sources of income for the individual, as long as no conflict of interest is present. The law's ban will clearly discourage from VA employment the very specialists and teachers VA hopes to recruit and retain. ... If physicians in critical specialties (especially some part-time physicians) are penalized by being denied fees that they would otherwise collect while not on duty with the VA, many will seek employment elsewhere. The VA system can ill afford to lose any of these specialists." The

House unanimously agreed in supporting H.R. 598. The bill before the Subcommittee today, H.R. 325, reaffirms this position.

The AAMC serves as the national voice for the 126 U.S. medical schools, over 90 professional and academic societies, and 420 teaching hospitals, 72 of which are VA medical centers. A total of 102 of the nation's 126 medical schools share an affiliation arrangement with one or more VA health care facilities. Since 1945, the VA and medical schools have been working together to provide high quality health care to eligible veterans. Medical schools are heavily invested in the VA and seek to relate to VA medical centers no differently than other teaching hospitals.

The relationship between VA medical centers and schools of medicine serve two very important purposes. Medical school affiliations provide the VA with a pool of highly trained medical professionals to help strengthen the overall quality of medical care to veterans. Affiliations play a key role in physician recruitment and retention for the VA. Through the affiliation agreements, the VA can offer a positive working environment including benefits such as opportunities to teach, to participate in nationally recognized research programs, and to have access to patients who need specialized clinical care.

The second function of this relationship is the VA's ability to provide an enriching educational environment for the training of future physicians. Half the physicians trained in this country received a portion of their education in a VA medical center. Students and residents at the VA receive intensive training in the care of patients with cardiovascular disease, cancer, and mental health disorders.

At the foundation of the affiliation agreements between VA hospitals and medical schools is the practice of providing professional parity between physicians at the VA and those at the medical school. Through these agreements, a physician may enter into a joint appointment as a physician at the VA medical center as well as a medical school faculty member. The medical school promotes integration of full and part-time VA physicians into the academic community, and makes a commitment to offer them the same career opportunities as faculty members who do not have VA responsibilities. The Federal employee honoraria ban imposed by P.L. 101-194 would severely disrupt this equitable relationship.

P.L. 101-194 precludes VA physicians who are also university faculty members from accepting compensation for activities performed as university faculty, including serving as a visiting professor, giving lectures, and publishing some articles or books. Such activities are an integral part of the academic enterprise and are critical to professional development and promotion. The honoraria ban sets apart medical school faculty who have VA hospital appointments from those who have appointments at other teaching hospitals. Moreover, the ban establishes a disincentive to continue to serve as a VA physician, at a time when VHSRA is facing staffing shortages and is challenged with serious problems in recruiting and retaining well-qualified health professionals, due in part to non-competitive salaries. In fact, because VA physicians' salaries generally lag behind those in other academic settings, the affiliated medical school will often subsidize the VA salary to keep compensation in line with non-VA based medical school faculty. A survey at one VA-affiliated medical school revealed that twenty percent of the faculty physicians who work at the VA are "likely" to leave the VA system within a year because of the newly-imposed honoraria ban.

While the prohibition on receiving honoraria will affect full-time VA medical professionals, it presents an even greater threat to retention of part-time VA physicians who are vital to meeting VHSRA's staffing needs. At affiliated VA medical centers, officials at the VA hospital and the medical school join to establish a staffing plan to accommodate expected workloads to meet patient needs. VA medical centers seek academic physicians to work part-time for two major reasons. First, a VA hospital may have a patient population that only requires some medical services on a limited basis; ophthalmology or neurological surgery are prime examples. Second, in many cases, the VA salary structure is not sufficiently competitive to attract practioners of certain medical and surgical specialties on a full-time basis; in these cases, a hospital director's best option is often to employ more than one qualified individual on a part-time basis to meet workloads and allow those individuals to supplement their VA income by working part-time in other clinical settings at higher rates. The VA is particularly dependent on part-time physicians to provide medical services in specialties such as radiology, anesthesiology, and many surgical specialties.

An academic environment provides opportunities to teach and mentor, to conduct biomedical research, and to interact with like-minded colleagues and students. The physicians that enter into arrangements as part-time VA employees are as dedicated to sustaining quality care in VA medical centers as those physicians who serve full-time. In fact, many university-VA physicians are renowned in their fields of medical practice. For this reason, outside groups invite them to present research findings, teach students and residents, and lecture on new developments in medical care. Many of these activities are expected of academics who seek tenure and other professional recognition. It may be argued that such activities are a responsibility because they involve the dissemination of knowledge linked to medical advances and improved understanding of human health and disease.

The honoraria ban denies VA-university physicians the ability to participate fully in academic pursuits that are open to their university colleagues who have no ties to the VA. As a result, the VA is likely to experience declining morale, tension in affiliations, and, most importantly, increased attrition, which will contribute to the VA's difficulty in recruiting and retaining high caliber physicians. Moreover, the ban is likely to impact negatively the quality of care delivered to veterans because the most senior and often best qualified VA physicians are those whose skills and expertise are sought outside the VA; these individuals will most likely be the most affected and the most quickly frustrated by the honoraria ban. For all of the above reasons the honoraria ban requires revision.

Finally, VHSRA has had in place for over five years a comprehensive set of rules to prevent the same type of unethical professional conduct that the honoraria ban seeks to prevent. Similarly, universities also require their employees to abide by strict standards related to conflicts of interest and the appearance of conflicts of interest. These policies promote the same goals and ethical practices as the honoraria ban stipulated in P.L. 101-194. It seems unreasonable to assume that Federal employees are more susceptible to outside influence than other professionals, and it seems unreasonable to ask Federal employees to limit participation in certain activities that are unrelated to their Federal employment. The AAMC supports H.R. 325 to amend the application of the overly broad directives extant in the current law.

STATEMENT OF STEPHEN D. POTTS, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY JANE LEY, DEPUTY GENERAL COUNSEL

Mr. POTTS. Good morning.

Let me first introduce my colleague, Jane Ley. She is the Deputy General Counsel of the Office of Government Ethics.

Mr. FRANK. Welcome.

Mr. POTTS. Mr. Chairman, as a result of what I have heard today, it seems to me pretty clear that there is a consensus that some legislation is required to rectify the problem we have all been talking about. So I am not going to go back and cover my testimony in detail. That's a part of the record.

Mr. FRANK. We will put it in the record.

Mr. POTTS. What I would like to do is just immediately home in on the questions that you posed and what you're interested in.

Mr. FRANK. Thank you.

Mr. POTTS. First of all, as to who is covered, we have made a little chart for our own purposes, which we will be glad to share with your staff, which takes each of the four bills that have been introduced and then that chart talks about the test for the limited ban, the coverage for the ban, coverage for restrictions and what reports are required, and whether or not it's retroactive. It has certainly been helpful to me to sort of sort out the different provisions of the bills and to compare them.

Where we stand at the Office of Government Ethics is that we believe, in terms of the coverage, the proper coverage is to include the members but also to cover all noncareer—and I emphasize the word "noncareer"—GS-16 and up Federal employees. So we think that is the proper place to draw the line.

In other words, what I'm saying is that when we are lifting the honoraria ban, we are lifting it for all people below that line. In other words, the honoraria ban would continue to be in effect for members and for all noncareer, GS-16 and up.

Mr. FRANK. The GS-17's, where would they be?

Mr. POTTS. If they're career, they would be free to take the honoraria. In other words, they would not be covered.

Mr. FRANK. They would be exempted. OK.

Mr. GEKAS. Is noncareer equal to civil service?

Mr. POTTS. They are not civil service. That's the difference. They're an equivalent scale, but they are noncareer——

Mr. GEKAS. Noncareer is a political appointee or noncivil service.

Mr. POTTS. Exactly.

Mr. FRANK. A temporary appointee would be like Jamie Whitten. [Laughter.]

Mr. POTTS. I will say there's a little factor in here that we really don't feel very strongly about—and there are sort of two ways to go on this. As perhaps you know, the President, through Executive Order 12674, has imposed a ban on any earned outside income on any of his Presidential appointees. Now, that would include anybody confirmed by the Senate. So it includes not only Cabinet officers and Assistant Secretaries but also people in the White House who have to be Senate-confirmed. So we're not talking about an

honoraria ban there; we are talking about a ban on any outside earned income.

So going back to Congresswoman Morella's example, someone who was growing roses and selling them, as far as that Executive order is concerned, they couldn't get income for selling the roses, much less making a talk about the roses.

Now, I guess what I'm getting at is one way of going about this, I think, would be to draft the legislation so it would be coextensive with the President's Executive order. In other words, it would say that there is an honoraria ban for people who are Presidential appointees. That would be fine with us. Also, the difference in that with what I originally said, it leaves a small group of noncareer, nonpresidentially appointed people out from under the ban. So we're probably talking about a thousand Federal employees that would make the difference there, in how you define it in that technical respect.

As I said, Mr. Chairman, we will be glad to talk to the staff and work with the staff in that respect, to try to refine that coverage definition.

As far as people in the House side are concerned, it is clear from the legislation that the Members of the House would be covered. I guess then the question is are there any other people that should be covered—in other words, that there would be a ban on accepting honoraria. I guess what we would suggest is that there be a level playing field and that probably the easiest way to do that, since you don't have civil servants that are literally GS-16's and above, would be to do that on the basis of pay. So that would be one way of extending the coverage to some of the people in the House who have equivalent positions to Presidential appointees. That would be, I think, one way to include them in the coverage.

Now, turning to a second matter that the chairman raised, on the conflict of interest provisions, in looking at the various bills we note that Congressman Rhodes' bill tracks very closely Senate bill 242. I was testifying yesterday before Chairman Glenn and his committee on that bill, which is dealing with this very same problem. Yesterday we testified in support of 242. It has this two-part test about, first, that the subject of the appearance speech or article and the reason for the honoraria is unrelated to the individual's official duties or status. We think that is a very important part of the test to retain, because there is, in fact, for the executive branch, a criminal statute on the books, which has been on the books for a long time—that's 18 U.S. Code, section 209. That provision of the law says that it's a criminal offense for a Federal employee to receive any supplementation of his salary from a private source. So we have got that for the executive branch that is a whole other question there. So we think this would be appropriate language.

We also think the other part is very important, that the person offering the honoraria has no interest that may be substantially affected by the performance or nonperformance of the individual's duties. There, of course, we are getting to the real nitty-gritty of the conflict possibility, and we think we are comfortable with that language. Indeed, we have in the past at OGE applied that test, so

it is something that we're comfortable with and have a little body of precedent you might say.

As far as the appearances issue is concerned, I think there is not a lot to worry about on appearances of conflicts of interest if you are talking about lifting the honoraria ban for mid- and lower-level employees. The fact of the matter is that really where the appearance problem crops up is with the higher ranking officials in the Government, whether they be judicial, legislative or congressional. I think it's obvious that the higher a person's profile is, the more focus there is on that person's activities, what else they do besides their official duties, and so there is a greater chance that there is going to be a concern about possible conflicts of interest.

Normally, when you get down with somebody at a GS–12 or whatever, you know, the appearance side of it is not the same kind of problem because there is not the public identity of that person as a high-ranking official, and what they're doing on their own time doesn't present the same level of problem as it does with a high-ranking official.

Finally, let me just comment on the question that Congressman Gekas raised about the outside employment, just to confirm that under the—in other words, let's go back to before January 1. For mid- and lower-level employees, there was no restriction on outside employment for individuals of that sort, except for just the general restriction that if the agency or department employing that person deemed that the outside employment was interfering in some way with the proper performance of that individual's duties, then, of course, it was a problem on that level. But there was no rule saying you can't get paid for a speech or writing a book or making an appearance or selling roses, whatever it is you might want to do. It was simply a general—just as you would any business, whether it's the Federal Government or not. If you have an employee who is not performing up to your standards because, let's say, he's a night watchman and he is working all night, and he comes to work zonked out, then you've got a problem. But that is not a problem unique to the Federal Government, and it's not a conflict problem in the sense that we are normally thinking of it, but simply being able to perform your job.

I might also say that—yes, please.

Mr. GEKAS. What about the higher level career employees?

Mr. POTTS. Under existing law and preexisting law, before January 1, there were some additional restrictions on the higher level employees that related to—where there was a cap placed at 15 percent of a level II executive. In other words, you took the compensation for a level II executive, took 15 percent of that amount, that was the cap for the higher ranking employees as far as the total amount they could earn in a year on an outside basis.

You see, it gets complicated, Mr. Gekas, because also, for those same people, they were covered by—most of them were covered by Executive Order 12674; that is, for Presidential appointees, where the President had put a flat ban on any outside earned income.

Mr. GEKAS. Presidents come and go——

Mr. POTTS. Exactly. That's precisely the point. That's why it ought to be covered in the law, because it is one thing for it to be

in an Executive order and it's another thing for it to be part of the law.

Mr. GEKAS. Forgetting the Executive order—You don't mind, do you, Mr. Chairman, if I examine?

Mr. FRANK. Go ahead.

Mr. GEKAS. If the Executive order here clouds the issue, let's set that aside for a moment. It is the Congress which adopted these 15 percent caps or whatever other kind of restrictions that you're talking about.

Mr. POTTS. That's correct.

Mr. GEKAS. Why isn't there movement to remove those like there is to remove the honoraria? What is so different from the 15-percent cap that you're talking about, where a guy could write a book and limit his earnings to 15 percent of his salary? What's the big difference here? What are we talking about?

Mr. POTTS. First of all—and I've only been in office since August of last year—but in talking to the staff, I have not seen that there has been any—in fact, I can't remember a complaint about that particular provision. That doesn't mean, of course, maybe there are some people out there that would like to complain about it and just have felt there was not a good possibility of getting the law changed.

I must say that for the higher ranking positions, part of the reason perhaps that there is not a lot of complaining is that those jobs are so demanding in terms of time that it's hard to imagine that somebody could be Secretary of the Treasury and have time to write a novel in his spare time.

Mr. GEKAS. What I'm saying is, isn't it true that we can infer that the Congress intended to restrict the activities of Federal employees over a certain level——

Mr. POTTS. That's correct. We have.

Mr. GEKAS. So when the Congress restricted the activities even further by the honoraria—and some are saying that's going too far—I have to sort that out as to where that blends with the other restrictions.

Mr. POTTS. Well, none of the legislation that has been proposed to correct this honoraria ban, as distinguished from an earned income limitation—you know, first of all, that's a distinction—none of this would go back and make any changes in that earned income limitation for the higher level employees. That limitation, of course, applies just to the executive branch, I believe.

Mr. GEKAS. You may proceed.

Mr. FRANK. Anything further, Mr. Potts.

Mr. POTTS. Let me just say that I think that covers all the points that you raised, Mr. Chairman. I again wanted to repeat our offer, that we will be happy to work with the staff and counsel.

[The prepared statement of Mr. Potts follows:]

STATEMENT OF

STEPHEN D. POTTS
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS OF THE HOUSE JUDICIARY COMMITTEE

ON
THE BAN ON HONORARIA IN
THE ETHICS IN GOVERNMENT ACT

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am pleased to be here to testify today on legislation that would modify the honorarium ban enacted in the Ethics Reform Act and found in section 501(b) of the Ethics in Government Act. As you know I supported a Senate amendment that would have modified this legislation last Fall before it became effective on January 1, 1991, and I now support your efforts.

While Congress made a policy decision in enacting the honoraria ban now in effect, I continue to believe that a different policy would be more advantageous to the government and less onerous to the many employees that it now affects. Conflict of interest restrictions and standards of conduct are respected by government employees when the restrictions seem fair and clearly related to government employment. When that relationship is not clearly discernible, not only does adherence to that restriction suffer, but the credibility of all the standards that make up the code of conduct for federal employees is undermined. That is why I am pleased that the Subcommittee has taken up this issue quickly in this Congress. The longer this restriction stays as it is now written, the harder I believe it will be for my office to persuade government employees to respect many of the other standards of conduct.

By way of background, the executive branch has always been subject to a number of statutes and regulations that limited the acceptance and the amount of honoraria that could be received by an officer or employee. That has not been as true for the other two branches. For instance, only executive branch employees are covered by a criminal statute, 18 U.S.C. § 209, which prohibits the acceptance of any payment or supplementation of salary as compensation for

services as an officer or employee. The statute also applies to the persons who pay the salary or supplementation of salary. This statute has effectively precluded the payment or receipt of compensation in the form of honoraria that might in any way be offered because of a person's government duties.

Since 1965, Executive Orders and implementing regulations have prohibited employees from engaging in outside activities that are not compatible with the full and proper discharge of the duties and responsibilities of their government employment. The prohibition includes activities that involve the acceptance of a fee or any other thing of value in circumstances in which acceptance may result in or create the appearance of a conflict of interest or that may result in or create the appearance of using public office for private gain. Further, officers and employees may not use information gained by virtue of their government employment that is not generally available to the public, nor can they use government time, equipment or facilities to carry out private activities. Until January 1, 1991 the test for acceptance of honoraria by employees (as opposed to the highest level officials) had been the following:

(1) Is the honorarium offered for carrying out government duties or for an activity that focuses specifically on the employing agency's responsibilities, policies and programs?

(2) Is the honorarium offered to the government employee or family member because of the official position held by the employee?

(3) Is the honorarium offered because of the government information that is being imparted?

(4) Is the honorarium offered by someone who does business with or wishes to do business with the employee in his or her official capacity?

(5) Were any government resources or time used by the employee to produce the materials for the article or speech or make the appearance?

If the answer to all of these questions was no, then an offered honorarium was acceptable, although it could not have exceeded $2000.

For higher level employees, there were additional restrictions. First, since 1979, individuals who hold advice and consent positions and since the mid-1980's, certain high level Presidential appointees in the White House Office have been prohibited by the Ethics in Government Act from receiving any outside earned income in excess of

15% of their government salaries. Second, the test for relatedness was more stringent for the highest level appointees. They were prohibited from receiving any compensation for any consultation, lecture, discussion, writing or appearance, the subject matter of which was devoted substantially to the responsibilities, programs, or operations of their agencies or which drew substantially on official data or ideas which had not become part of the body of public information. And finally, since April of 1989, the President has, by Executive Order 12674, prohibited his full-time appointees from having any outside earned income, including honoraria. In sum, the receipt of honoraria under circumstances that created an actual or apparent conflict of interest was already prohibited for officers and employees of the executive branch.

The honoraria restriction of section 501(b) of the Ethics in Government Act is simply an added layer on top of these existing restrictions in the Executive branch -- a layer that, in our judgment imposes too great a burden on the vast majority of government employees and is unnecessary to protect the government from unethical conduct.

As you know, the National Treasury Employees Union, the American Federation of Government Employees, and twelve employees represented by the American Civil Liberties Union each filed suit challenging the constitutionality of the new honoraria restriction that became effective January 1, 1991. The Department of Justice is defending the constitutionality of the statute as it is now in effect. The cases were consolidated by the U.S. District Court for the District of Columbia which denied the plaintiffs' request for a temporary restraining order and/or a preliminary injunction. The U.S. Court of Appeals for the D.C. Circuit denied emergency injunctive relief but expedited consideration of the appeal from the denial of the preliminary injunction. NTEU requested a stay from the Supreme Court, which was denied. A hearing before the Court of Appeals on the denial of the preliminary injunction was held on January 29, and, at the time of the submission of this testimony, no decision has been rendered.

With that background in mind, I would like to comment briefly upon the four bills that have been introduced in the House that would modify the honoraria ban of section 501(b) of the Ethics in Government Act. In general, all of the bills would provide for a two-tiered application of the ban. One class of individuals would remain totally prohibited from the receipt of honoraria while another class of individuals would be covered by either a less restrictive ban or no ban at all. Two of the bills would make the modifications to the restriction retroactive to the effective date of the present strict ban and two do not include an effective date. Two would reimpose the

$2000 limit on any honoraria properly accepted and two would not. And, two would require that any honoraria accepted be reported pursuant to section 107 of the Ethics in Government Act and the other two are silent with regard to additional reporting requirements.

The two most important issues that we note in all of the bills are (1) the class of officers and employees covered by the strict ban and the class afforded some relief from the strict ban and (2) the test for application of the restriction as modified.

With respect to the first issue, all of the bills would allow the strict ban to remain applicable to Members. H.R. 109 and H.R. 474 would continue to apply the strict ban only to Members. All others in the government would be subject to a ban that would involve determining whether the honorarium is related to government duties and position. H.R. 325 would apply the strict ban to Members, all persons appointed by the President with advice and consent of the Senate (not Presidential appointees in the White House Office) and all O-7's and above in the uniformed services. H.R. 414 would apply the strict ban to all Members and any non-career officer or employee whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for GS-16. This is the same class of individuals to which the restrictions on outside earned income and outside activities of sections 501(a) and 502 of the Ethics in Government Act apply.

Of the four, H.R. 414 would subject the most extensive class of individuals to the strict ban. However, in the Executive branch, because of Executive Order 12674, as amended, most of that class, i.e., most non-career Executive branch officers and employees who are appointed by the President, are already prohibited from having any outside earned income. As honoraria is defined in current law, anything of value that would violate the honoraria ban of section 501(b) would also violate that Executive Order.

The class covered by the Executive Order earned-income restriction does not however include those individuals who are appointed to non-career positions at GS-16 or above by someone other than the President. For instance, many Deputy Assistant Secretaries within departments are non-career members of the SES. They are not appointed by the President and are not covered by the President's total ban on outside earned income. Thus, but for the current statutory ban, they could accept honoraria for activities totally unrelated to their government duties and position. Therefore, the practical effect of H.R. 414 on the executive branch would be to prohibit the receipt of honoraria by this relatively small group of individuals not already subject to the more restrictive prohibition of the President's executive order.

While H.R. 414 would address the concerns many Executive branch employees have had with the new ban, we would not object if the complete honoraria ban covered a narrower group of federal officials. However, we believe a complete ban on receipt of honoraria should cover the most senior officials of all three branches as a visible means of fostering public confidence in our government. The other bills vary from this principle. As noted, H.R. 325 would not cover the highest level Presidential appointees in the White House Office. On the other hand, it would cover certain uniformed officers that even the outside earned income and employment restrictions of the Ethics in Government Act do not cover. H.R. 109 and H.R. 474 would not continue the strict ban for high level officials of either the Judicial or Executive branches.

In sum, we believe that the class that is specified by H.R. 414 to remain covered by the total ban is the most preferable of all four bills, but that a somewhat narrower class would still meet the purpose of the strict ban which, in part, was directed to the public perception that all honoraria offered to the highest level officials in the government is inextricably entwined with their official position.

With regard to the second issue, the relief provided to the vast majority of federal employees, all of the bills through similar descriptions, would provide that an honorarium be prohibited only if the subject of the appearance, speech, or article is related to the recipient's duties or status. Two of the bills would also require that the person offering the honorarium have no interest that would be substantially affected by the performance or non-performance of the individual's duties.

We would, for executive branch employees, expect to interpret the "relatedness" test of any one of these bills in the same way we have in the past, and to apply the same general five-part test discussed earlier for lower-level government employees. For instance, a lawyer writing a law review article on a subject that he researched from publicly reported cases could receive an honorarium for that activity but could not receive one for making a speech about the activities of his division given in his official capacity. An accountant could receive an honorarium for a speech on double entry bookkeeping but could not do so for an article describing cost accounting principles he was presently drafting. On the other hand, the avid flyfisher who happens to regulate long haul truckers would be unable to receive an honorarium for a speech on flyfishing given to the truckers at their annual convention. Our interpretation would necessarily have to take into consideration all other statutes and regulations that apply to these executive branch employees. Therefore, we see that the

description of the relatedness test will ultimately have more effect upon the Legislative and Judicial branch employees than it will probably have on the executive branch because they are not subject to the same extensive statutes and regulations.

This concludes my written statement. I will be happy to answer any questions that you might have.

Mr. FRANK. Let me say that I think the fact that your office is in existence is helpful to us in legislating, because one of the provisions I had is that there be confidential filings, confidential as far as the general public is concerned, but the employer would have access to it.

Second, I want to be very explicit, that I appreciate your mentioning that there were certain forms of wording which we had some experience with. Obviously, when we're legislating, to the extent possible, if we can pick up an existing verbal formula which has been tested and where there's a body of interpretation, that is to be preferred. Because giving people guidance is very important. The great majority of employees want to do exactly what they're supposed to do and they need to have that guidance.

Let me just ask you a couple of brief questions. Your proposal on the GS-16, that was for the executive branch. As I understand it, you said—and I don't mean to lock anybody in here—but one proposal would be anybody who is a career civil servant is exempted, insofar as he or she was serving as a career civil servant. If you were a career civil servant who took a temporary Presidential appointment, you would be covered by those rules——

Mr. POTTS. That's right.

Mr. FRANK. And when you went back into the career service, that would change?

Mr. POTTS. Right.

Mr. FRANK. And as far as the legislative branch is concerned, you would use a GS-16 pay level cutoff to approximate that same thing, and we have to work out appropriate ones for the judiciary, whatever they are.

Let me say with regard to the statute you mentioned, about the criminal prohibition in the executive branch against supplementing salaries, we have a similar effect achieved in the House because we have a House rule—I don't know what the Senate does—which says members cannot accept any additional funds from private sources or put any additional private funds into their clerk hire allowance. So we, as members, are limited to the amount that the House votes per office. That has the effect of prohibiting any outside supplementation by making it against the rules for the member to apply any of that. So we do achieve a similar goal in terms of supplementation.

The last point I would say to my friend from Pennsylvania. I take the fact that we didn't have complaints before and have them now as a sign that we may have achieved a pretty good balance before than now. I would subscribe to Mr. Potts' analysis of the 15-percent limit on outside earned income as not really biting that much. If it only applies to higher level officials, they are less likely to have the time and energy to do this and are more worried about conflicts of interest.

What happens is, that means that corrupters are not random in their approaches. The more important you are, the more likely you are to get an offer that's corrupting, at least at the level of a speech, et cetera. You might like to take a relatively down-in-the-ranks inspector and try to corrupt him or her, but it might be a little hard to justify inviting the inspector to come and speak to your group. So probably OSHA inspectors don't get that many

speaking engagements even from people who might like to get on their good side, so I think that may be right.

The book royalties, again we should remind people, are exempt now. That can be a distortion because that's a case—I guess Melville couldn't have serialized it and gotten paid for the serialization, which they used to do in the 19th century, but he could have written a book and gotten the royalties.

My impression from the conversations I have had—it's not a statistical compilation yet—is that the 15-percent rule, even if it did apply to lower level employees, would not be a serious problem for most of them. We're not talking about people who are getting vast sums of money. That doesn't mean it should exist down at that level.

I have no further questions. We'll go to Mr. Reed.

Mr. REED. Mr. Potts, has your Office followed up this legislation by seeking some information from affected employees and have you formed any general conclusions about the effect of the legislation?

Mr. POTTS. Yes, we have, Mr. Reed. We really haven't had to take a very proactive role in that respect because we have gotten a tremendous amount of correspondence, some sent to us from the Hill, some that's been directed to us directly, and some that was just oral in the way of what we call random calls that come in asking for advice about this.

I would say, certainly since I've been in office since last August, it has been overwhelmingly the most focused upon subject of any action of the Office of Government Ethics or the Congress. So there is definitely a tremendous amount of concern out there among Federal employees about this issue, of course, as concrete evidence of the litigation that was begun by the ACLU and two Federal worker unions, which is ongoing as we speak.

Mr. REED. Your impression then is that this reform is something that should be done. I don't want to unfairly characterize your testimony, but you seem to accept the two-pronged test proposed in Mr. Frank's legislation, and the question you're raising is who should it apply to; is that a fair summary?

Mr. POTTS. I think that's correct, yes.

Mr. REED. Just an additional followup question. Could you give me an example of a typical position of someone who would be above GS–16 but a career person who would be exempted, the type of individual we would be dealing with?

Mr. POTTS. Well, we have sitting at the counsel table someone who is a career SESer and would not be covered.

Mr. FRANK. She would remain covered?

Ms. LEY. I would be subject to less strict bar under your test.

Mr. POTTS. Since she is career SES.

Mr. FRANK. Oh, career SES.

Mr. REED. Following up on the chairman's question, is there at present a legal definition that would make it clear what is career and what is not career? Is that something that would have to be developed in conjunction with this legislation?

Mr. POTTS. No, I think that is clear. It is clear, and we can share that with the staff.

Mr. REED. Would that be incorporated into this present legislation by reference at least?

Mr. POTTS. By reference, I think would be sufficient.

Mr. REED. Thank you, Mr. Chairman.

Mr. FRANK. Let me clarify, because I don't want to be responsible for any lack of understanding. Mr. Potts has been very forthright, which I admire, in saying he thought this honoraria ban went too far and that we could protect the legitimate interests by cutting it back. I just asked him not to repeat that. But he's been very clear from the beginning and we appreciate that.

Mr. Ramdstad.

Mr. RAMSTAD. Mr. Potts, being a mere freshman and possessing all the naivete attendant to that designation, you will have to excuse me. I'm not familiar with the legislative history on this law. But my question is twofold.

First, did your office support the broad ban on honoraria at the time the law was enacted?

Mr. POTTS. No, we did not.

Mr. RAMSTAD. You did not support the broad ban?

Mr. POTTS. We did not support the broad ban. We had tried, in fact, to point out that we thought it did go too far. I'm saying "we." I was not in office at that time. But I understand this problem was pointed out ahead of time.

Mr. RAMSTAD. The second question goes to the appearance of impropriety which, of course, is relevant in this law, getting on the good side, as the distinguished Chair points out. Wherein lies the magic in the distinction between, say, a GS–16 or a GS–15 in terms of perception, in terms of the appearance of impropriety in accepting honoraria for various purposes?

Mr. POTTS. I think what it really gets down to is that the people who you are reading about in the newspaper and so forth and that are in the public eye are the high-ranking public officials. So I might agree with you to a certain extent in that I don't believe there is a technical legal distinction that we're trying to draw. It is simply that I think, when you really talk about, as a practical matter, where the problems may exist, they are going to be with—let's say in the executive branch—they're going to be with people who are Presidential appointees because they are the ones who are in the policymaking positions and they are the ones that the press is going to write about and so on, that the reporters are going to focus on as to what their activities are, not only officially but then whatever else it is they may be doing that would create this appearance of impropriety.

Mr. RAMSTAD. Thank you, Mr. Chairman.

Mr. MAZZOLI [presiding]. Maybe I could ask just a couple of questions on my own before going to the next witness.

Maybe it's in the record, but what are some of the examples of what people do, Federal workers who currently are or were, prior to January, engaging in outside activities? I know what the big shots do. We know full well about speeches and monographs and——

Mr. POTTS. Right. I assume you want more of the mid- and lower level——

Mr. MAZZOLI. Right, those who perhaps would be exempted if we decide to go with the legislation. What are they doing?

Mr. POTTS. Just about everything. I mean, it really is remarkable. There was the example of the attorney who writes columns about wine. He's an expert on wine. He writes articles about wine. There was the example of—I can't remember exactly where the employee worked, but it had nothing to do with raising sheepdogs. But he gave lectures about how to raise sheepdogs.

Mr. MAZZOLI. These are mostly hobbies; is that a fair statement?

Mr. POTTS. Oh, absolutely. An awful lot of people write about geneology, about growing roses. It literally covers the gamut of human activity.

Mr. MAZZOLI. Is it your experience that these activities constitute no likely compromise of their work, or any situation of conflict?

Mr. POTTS. Frankly, I go a little further than that. I think it's worse than just being neutral. I think, by allowing people to pursue their hobbies and to have some of the recognition of getting paid for it—I mean, there is a little element there that what I did was really worthwhile. I mean, they could do it for free and probably the person that gives a lecture on roses is not going to get very much for those lectures, I doubt. But it is just sort of an imprimatur, that hey, what you've done is valuable and useful and we really appreciate it and want to give that kind of recognition.

Mr. MAZZOLI. And for the most part, the higher up the scale you get, the less time you have and, therefore, the less you indulge your hobby; is that your experience?

Mr. POTTS. Well, it's not so much that you wouldn't have a hobby, but you certainly don't have quite the opportunity to pursue it in the same way that a person who has more of a 9 to 5 job.

Mr. MAZZOLI. How much of this is for the money, in a sense to shore up a pay structure which may not be particularly appropriate, given the talent of the people involved?

Mr. POTTS. I'm just speaking of a personal impression. I really don't think it is so much about the actual money as a supplement to the pay to enable them to continue their Federal employment. The tone of most of the letters that I have read—and I've read a slew of them on this subject—really suggest to me that it is more sort of confirmation that they really should have pride in whatever this is as a hobby or an avocation that they have undertaken.

Mr. MAZZOLI. Since you've read all those letters, you have probably been reading all these Federal columns that appear in the Post and the Washington Times.

Mr. POTTS. I've read some, yes.

Mr. MAZZOLI. I'm sure you have.

One of the concerns raised by people—and maybe they're disgruntled employees whose hobbies are not in demand—but they say it's not so much their worry about what people do as moonlighting but what they do as daylighting, with telephone calls that come into the workplace, working over class plans, talking, engaging in reading research, preparing for the nighttime talk, going through all of the rigamarole that, in effect, supports what is being done at night.

Is there any experience you have there? Is any of that valid, or is that just pure disgruntlement?

Mr. POTTS. No, I'm sure that there are some abuses like that. Most of the letters we were getting in were ones that wanted the honoraria ban lifted.

Mr. MAZZOLI. But did you get some of the other ones?

Mr. POTTS. I can't say that I have read any letters pointing that part out. But I think it's a valid concern, but I think it's really a management concern. In other words, I think it's up to management to deal with that.

Mr. MAZZOLI. That was my next question. To what extent currently—it may not be an edict—but to what extent is there any kind of an arrangement whereby the individual who has these outside hobbies or activities for which pay is sometimes achieved required to give notice to the superior of what that is or how it is, and to what extent is that purely and solely their activity, that no one needs to know about, so long as they show up in the morning?

Mr. POTTS. Let me ask Ms. Ley to address that.

Ms. LEY. In the past it has varied by agency. Each agency had its own set of regulations dealing with outside employment or other activities. Some required preapproval and some did not. But they gave guidance to any employee about when the employee should have enough sense to come ask.

In the future, our office has been tasked by the President's Executive order to issue one set of regulations for the entire executive branch, and we will have to deal with the issue of preapproval or not in those regulations for all Federal employees.

Mr. MAZZOLI. And what's the drift now? Is there any preliminary notion as to whether there will be preapproval, prenotice, or only an on-cause basis?

Ms. LEY. I think at the moment the draft would not require everybody in the Government to have preapproval. Again, there will be a list of criteria the employee could take a look at to find out whether he or she should come in for the approval, because asking the grade 2 to come in to find out whether he or she can babysit is not what we're interested in having.

Mr. MAZZOLI. In the preliminary draft, is there anything about phone calls during company time, so to speak?

Ms. LEY. Yes. That has always been prohibited in the past. You can't use Government resources for private purposes.

Mr. MAZZOLI. But they have been used probably?

Ms. LEY. Apparently so.

Mr. MAZZOLI. But it's something that would be in these proposed regulations?

Ms. LEY. Yes. That will remain prohibited.

Mr. MAZZOLI. Thank you very much.

Any other questions?

Mr. GEKAS. Yes, Mr. Chairman.

Barney was reemphasizing his concern that perhaps it is the offeror where we should be focusing on the problems of conflict of interest or possible corruption, as it were, attempted corruption, not the subject of the work or the subject of the speech or the appearance by the Federal employees. Do you share that new emphasis, or should that be given more weight than the subject matter?

Mr. POTTS. I think both of them have to be borne in mind, so I think they really both should be covered. I wouldn't say one should

receive greater weight than the other. I think they're both important.

Mr. GEKAS. Thank you very much.

Mr. POTTS. I wonder if I could ask Congressman Reed to convey my good wishes to Governor Sundlun. He's a good friend and I know he's pleased to have a colleague here in the Congress.

Mr. REED. Thank you, Mr. Potts. I'm sure at this point the Governor would be grateful to receive those good wishes.

Mr. MAZZOLI. Thank you very much. There will perhaps be other questions that might be sent down by mail.

The Chair would like to call forward Mr. Fred Wertheimer, who is the president of Common Cause.

Mr. Wertheimer, we appreciate your appearance. Your statement, without objection, will be made a part of the record.

STATEMENT OF FRED WERTHEIMER, PRESIDENT, COMMON CAUSE

Mr. WERTHEIMER. I would like to submit my statement and make some remarks, Mr. Chairman.

Mr. MAZZOLI. Without objection.

Mr. WERTHEIMER. We very much appreciate the opportunity to appear this morning. Common Cause has supported and worked for measures both to ensure high ethics standards in the Federal Government and to assure appropriate salary levels for public officials. We strongly supported and worked for the passage of the ethics/pay package adopted in 1989 which resulted in the 1989 Ethics in Government Act.

The Senate, in exempting itself from the honoraria ban and ethics reforms in the 1989 act, left itself in the wholly untenable position of having substantially lower ethics standards than the rest of the Government. We believe that any proposed legislation to revise the honoraria ban in the 1989 Ethics Act must include a provision to ban honoraria for Senators. We do not believe this issue can be left standing as it is.

There have been claims made that Congress, in enacting the 1989 Ethics Act, mistakenly or inadvertently applied the honoraria ban to certain members of the Government. This is simply not correct. As the reports of two Presidential commissions and the House Task Force on Ethics made clear, the honoraria ban was designed to ban honoraria outright for all Federal officials and employees.

The President's Ethics Commission urged that Congress should ban the receipt of honoraria by all officials and employees in all three branches. The House Bipartisan Task Force asserted that, "Honoraria should be abolished for all officers and employees of the Government."

The statute dealing with honoraria has been on the books since 1974. The definition has covered all Government employees since 1974. The change that was made in 1989 was to move from a restriction on the amount that could be accepted to a ban. The definition was not changed, the coverage was not changed, and I think it was as clear as could be in the report language, the statute, the history, that this was a ban on honoraria for all Federal officials.

Mr. MAZZOLI. Mr. Wertheimer, just for the sake of the record, are those reference points in your statement?

Mr. WERTHEIMER. They are in my testimony, Mr. Chairman.

Mr. MAZZOLI. Thank you very much.

Mr. WERTHEIMER. The honoraria ban does not stop individuals from speaking; it does not stop articles from being published; it does not stop appearances from being made. It does bar Federal officials from being paid by private interests for these activities.

We would like to submit for the record a copy of the brief that we have submitted in the Federal Court of Appeals case on the constitutionality of the honoraria ban. We believe it is constitutional, and the brief sets forth our views on that.

Mr. MAZZOLI. Without objection, it will be made a part of the record.

[The brief appears in the appendix.]

Mr. WERTHEIMER. Common Cause supported the flat ban on honoraria fees for all Government officials in 1989, and we continue to believe it is the most appropriate way to deal with this important ethics issue. The honoraria fee system has become a particularly pernicious vehicle for private interests to make influence payments to public officials, payments that go directly to their personal financial benefit. Once a flat ban on honoraria fees is weakened, the door again is open to potential abuse.

It is an inherently difficult task to draft language that allows honoraria fees while at the same time preventing them in all cases where abuses may occur. That is particularly true in the case of Congress, given the broad sweep of responsibilities that exists here. It is hard to imagine, for example, many circumstances where a party making an honoraria payment to a professional staff member of the House Ways and Means Committee or the Senate Finance Committee or to the top staff aide of a Member of Congress would not have some interest that could be affected by that staff member of aide's performance of their official duties.

It becomes all the more difficult to go down this path of a case-by-case restriction where the bodies responsible for overseeing and enforcing ethics rules have been lax in carrying out their duties and where the payments are not required to be publicly disclosed.

Despite our concerns, Common Cause is prepared to support limited revisions in the flat honoraria ban under the following conditions: High level officials in the three branches of Government whose salaries are equal to or above the level of GS-16 must continue to be subject to the flat honoraria ban to assure against any abuses occurring involving these key officials. Second, middle- and lower-level Federal officials must continue to be subject to an honoraria ban in situations where conflict of interest or the appearance of conflict of interest may occur. Third, requirements must be enacted to ensure that appropriate oversight and enforcement occur of the revised honoraria provision for middle- and lower-level Federal officials.

We strongly believe that high level officials, including senior congressional staff and career Government officials, must not be permitted to accept any honoraria fees. Because these officials and staff are in such key positions in Government and because the

honoraria fee system has become such a pernicious vehicle for abuse, the honoraria ban covering them must be foolproof.

We oppose the legislation introduced by Chairman Frank in its current form because it exempts all Government officials other than Members of the House, judges, and Presidential appointees subject to Senate confirmation from the flat honoraria ban. This means senior congressional staff and a number of other senior Government officials would be exempt from the outright ban.

In its current form, the Frank bill would exempt the White House staff, which is not subject to Senate confirmation, from the honoraria ban, and while that may not have been the intent in the drafting of the bill, that certainly is the way the bill is written now. We believe both the White House staff and senior congressional staff must be subject to the statutory flat ban on honoraria in order to avoid opening the door to any abuses involving these key officials, and we would oppose any legislation that does not cover them with a flat ban.

Concern about the payment of honoraria fees to senior congressional staff had become a growing problem and was a public issue at the time that the flat honoraria ban was contemplated and enacted. For example, in 1988 two House aides to the then House Speaker and House minority leader "embarked on a trip to Oklahoma and Texas in which they collected $28,000 in speaking fees in 2 days, more honoraria than most members receive in a year," according to the Washington Post. The money came from contractors, engineers, and a karate uniform maker.

The staff director of the Senate Finance Committee received a total of $37,550 for speeches in 1985 and 1986 from "groups eager to learn of the 1986 tax reform measure's details," according to the Wall Street Journal.

We would like to enclose copies of those articles for the record.

Mr. MAZZOLI. Without objection.

[The articles follow:]

The Wall Street Journal 5/26/89

Honoraria, Bounty of Special Interest Groups, Trickle Down to Some Congressional Staffers

By John E. Yang
Staff Reporter of The Wall Street Journal

WASHINGTON—William Pitts, a senior House aide, took less than two weeks last year to earn $16,500 in speaking fees.

Mr. Pitts, the top aide to House Minority Leader Robert Michel (R., Ill.), received the largess from the Tobacco Institute, Texas businessman H. Ross Perot Jr. and Mr. Perot's oil and gas company, H.R. Petroleum, among others.

And Mr. Pitts wasn't the only congressional staff member to do well. Many of his appearances were made with Joho Mack, the aide to House Speaker James Wright who resigned earlier this month. Io the Senate, where staff members' 1988 financial-disclosure forms won't be made public until next week, Sheila Burke, GOP leader Robert Dole's top staffer, reported picking up $3,300 in honoraria two years ago.

Even congressional officers without any legislative responsibilities reap the rewards. Secretary of the Senate Walter Stewart, a close associate of Sen. Robert Byrd (D., W. Va.), accepted $12,000 for speeches in 1987; he haso't yet completed his 1988 disclosure form. House Doorkeeper James Molloy took in $2,600 from speeches last year. And the Senate chaplain reported collecting $12,460 in speaking fees in 1987.

Largely overlooked amid the heightened scrutiny of the ethics of lawmakers are the honoraria received by their staff. Federal rules bar executive-branch workers from accepting outside fees of any kind, and House and Senate rules limit the total amount of honoraria that lawmakers may keep, but there isn't any ceiling for their staff.

That bothers some who view honoraria as little more than influence peddling. "Staff can play a critical role lo helping or hindering an interest group," says Fred Wertheimer, president of Common Cause, a citizens' lobbying group. "No one has quite explained the rationale for staff members receiving these honoraria fees."

It's impossible to determine all of the honoraria paid to congressional aides because only those holding top jobs or earning top salaries must disclose details of their personal finances. Of those who are required to disclose outside income, many accept only a few hundred dollars each year for lectures or seminars at universities and think tanks, according to a review of financial disclosure forms. But some important staffers take thousands of dollars each year from companies and groups that have much to win or lose in legislation.

Mr. Pitts, whose salary is $85,500, hadn't accepted large amounts of honoraria before last year, reporting a total of only $6,300 in 1986 and 1987. In all, he got $17,500 last year, giving $6,000 of it to charity.

William Pitts's 1988 Honoraria

DATE OF PAYMENT	SOURCE	AMOUNT
Jan. 5	F.J. Spits	$2,000
Jan. 6	Century Martial Arts	2,000*
Jan. 6	HTB Inc.	2,000
Jan. 7	William Beuck	2,000*
Jan. 7	The Tobacco Institute	500
Jan. 11	H. Ross Perot Jr.	2,000
Jan. 11	H.R. Petroleum	2,000
Jan. 11	Oklahoma Business Dev.	2,000
Jan. 11	Manhattan Construction	2,000*
Feb. 10	Anheuser Busch	1,000

*Donated to charity
Source: Financial Disclosure Statement

On reflection, he says, he has become uneasy with the exercise and has decided to stop. "When done on a broad scale, such practice appeared inappropriate for a staff person in my position," Mr. Pitts says. "I no longer accept honoraria."

Messrs. Mack and Pitts were in demand because they were important decision-makers in the House. Many staff members find themselves in demand when things heat up in their fields of expertise.

As the tax-overhaul bill made its way through the legislative shoals in 1985 and 1986, for example, William Diefenderfer, then staff director of the Senate Finance Committee, received $37,550 for speeches sponsored by groups eager to learn of the measure's details, according to Senate disclosure forms.

"I adhered to the letter of the law," Mr. Diefenderfer, now the deputy director-designate of the Office of Management and Budget, said at his confirmation hearing earlier this month. Mr. Diefenderfer said he could have made much more but had rejected fees from some groups in order to avoid the appearance of a conflict. "I did not accept the honoraria, but I made the speech," he said.

Some of the top honoraria recipients in the Senate haven't any specific legislative responsibilities but, like Mr. Stewart, are close to important lawmakers.

Henry Giugni, who as Senate sergeant-at-arms controls more than 1,400 jobs and a budget of more than $100 million, picked up $5,500 in 1987, his first year lo his current post and his first year reporting any honoraria. Mr. Giugni, a former Honolulu vice-squad officer who was paid a salary of $86,000 last year, was a top aide to Sen. Daniel Inouye (D., Hawaii), a senior member of the Senate Appropriations Committee, for 24 years.

One Senate employee who has consistently received large sums of honoraria has even higher connections: Chaplain Richard Halverson proves it pays to pray in the Senate.

Mr. Halverson, a Presbyterian minister whose 1988 Senate salary was about $77,500, made $12,460 in speaking fees in 1987. Most of his fees were for appearances before church groups, but included $500 for a speech to the Associated General Contractors and $150 for a speech to the National Hardware Dealers Association.

Some lawmakers bar their staff or aides on committees they control from accepting honoraria. Ironically, one such member is Chairman Dan Rostenkowski (D., Ill.) of the House Ways and Means Committee, who himself reported collecting $222,500 in honoraria last year, the most of any lawmaker.

The filings also show that many top aides hold stakes in companies affected by legislation the staffers help shape. For instance, William Michael Kitzmiller, staff director of the House Energy and Commerce Committee, said that last year he inherited from his mother-in-law between $17,506 and $40,000 in Amoco Corp., Exxon Corp., Southern California Edison Co., Bell Atlantic Corp., Ceotel Corp., U S West Inc. and Waste Management Inc. stock—all industries lalling within the committee's jurisdiction.

While House rules prohibit lawmakers and congressional aides from using their official positions for personal gain, nothing prevents them from holding financial interests that might conflict with their official duties.

—Robert J. Esther contributed to this article.

THE WASHINGTON POST OCTOBER 6, 1989

For Two in the House, A Fast $28,000 in Fees

By Charles R. Babcock
Washington Post Staff Writer

In January last year, two top House leadership aides embarked on a trip to Oklahoma and Texas in which they collected $28,000 in speaking fees in two days, more honoraria than most members receive in a year.

John P. Mack, floor assistant to then-Speaker Jim Wright (D-Tex.), and William Pitts, his counterpart for Minority Leader Robert H. Michel (R-Ill.), received fees from contractors, engineers and a karate uniform maker.

The appearances were arranged by a Mack friend, Paul Roberts, who waa a consultant to Texas developer H. Ross Perot Jr., son of billionaire H. Ross Perot. They were made two weeks after Mack, without hearings or debate, inserted language in an appropriations bill adopted as Congress was about to adjourn that ordered the Federal Aviation Administration to put up $25 million in seed money for a cargo airport in Wright's congressional district.

FAA documenta, obtained under the Freedom of Information Act, show that in November 1987 the agency actively opposed the airport. It called the $25 million set-aside "unjustified" and said the FAA supported a much smaller, general aviation airport that could be built for about $4.5 million on 380 acres Perot donated. The land was part of 16,000 acres the Perot group owns in the area.

Stanley Brand, a Washington attorney apeaking for Perot, said the timing of Mack's work on the airport funding and the large fees he and Pitts accepted two weeks later were coincidental. "There clearly was no intent by the Perot group to say thank you to John Mack," Brand said.

Perot Jr. is not recorded aa having ever paid honoraria to members of Congress. Brand would not explain how the developer happened to want to hear from Mack and Pitts at the time or what consultant Roberts did for the Perot group. The lawyer said only that the payments were "within the rules. They were in connection with the rendering of services. It had nothing to do with the airport . . . . It was not in return for any action taken."

Mack, who resigned from Wright's staff last spring after a Washington Post story detailed his brutal stabbe attack on a woman years earlier, could not be reached for comment. He reported $12,000 in honoraria from the trip. Roberts did not return a reporter's calls.

Pitts, who received $16,000 on the trip and gave $6,000 of it to charity, declined to comment. He haa told other reporters that he no longer accepts fees for making speeches or appearances. A Michel apokesman said, "Bill knew nothing of the specific legislative interest of the group. He knew nothing of the airport. He had no involvement in, or knowledge of, the behind-the-scenes activity aimed at getting the airport funds."

Perot told the Dallas Morning News that he met Mack and Pitts at the airport in January 1988, and took them on a tour of the airport development. Pitts, but not Mack, reported receiving a $2,000 fee from Perot. They then moved to another Perot office and discussed energy policy, with Perot's oil company paying Pitts another $2,000 and Mack $2,000. Asked why Perot paid two honoraria the same day, Brand said, "There were two aeparate events." William Beuck, a Perot consultant, then took the two staff aides to dinner and paid Pitts another $2,000.

Each staffer reported that HTB Inc., an Oklahoma City architecture and engineering firm, paid for their airfare, two days' food and lodging and a $2,000 honoraria. They also received $2,000 honoraria each from F.J. Spitz, an Oklahoma City engineer; Century Martial Arts, which makes karate uniforms; Manhattso Construction of Tulsa; and Oklahoma Business Development Council, an entity that cannot be found in any business directory or telephone book.

Leonard Ball, an HTB vice president, said in an interview that he invited members of local businesses and staffs of Republicas and Democratic officeholders to hear Mack and Pitts talk about Congress.

His firm gets about half its business from federal government contracts and "everything we can do to get more economic vitalization for Oklahoma makes a bigger pie in which we can compete," Ball said. "That's our interest."

The firm has a small contract on the Perot airport, but Ball said that it had no connection with the Mack-Pitts appearance. "There was no quid pro quo," he said.

Staff researcher Lucy Shackelford contributed to this report.

The Washington Post October 6, 1989

Interest-Group Honoraria Plentiful for Top Hill Aides

By Charles R. Babcock
Washington Post Staff Writer

One Monday last April, Richard J. Sullivan, longtime chief counsel of the House Public Works Committee, flew to Chicago at committee expense to meet with officials of Waste Management Inc. and tour the firm's lab. Sullivan asked Waste Management to pay him a fee for the visit; the company paid him $2,000, and Sullivan flew back to Washington.

One Monday last month, Kevin C. Gottlieb, staff director of the Senate Banking Committee, traveled to a downtown Washington hotel to give a lecture to a life insurance company—a lecture sponsored by a group called the Washington Campus. It was one of about 30 talks—at $600 per appearance—that Gottlieb will make for Washington Campus this year. Following his own past practice, Gottlieb did not itemize these honoraria on a recently filed disclosure report.

Congressional aides are permitted to accept speaking fees and make trips paid for by special interest groups just like their bosses. Interviews and a review of hundreds of staff disclosure statements show that, as with lawmakers, the most influential—committee staff directors and longtime experts, such as Sullivan and Gottlieb—receive the most honoraria. But staff enjoy one advantage over members: the amount of honoraria they can keep for themselves is not limited by House or Senate rules.

In a year when honoraria for members have received widespread public attention, speaking fees for aides have barely been noticed. Rep. Glenn M. Anderson (D-Calif.), Sullivan's committee chairman, said he wasn't aware the chief counsel had traveled on committee time and agreed to receive a speaking fee. "When we hire people and pay them so much money and pay their expenses, they shouldn't get any extra expenses to get an honoraria," he said. Anderson, who decided in August to ban further acceptance of honoraria by his committee's staff, asked that he may ask Sullivan to reimburse the panel for his travel costs.

Gottlieb issued his own edict when he became staff director of the Senate banking panel in January, instructing Democratic staff

See STAFF, A20, Col. 1

Rules on Staff's Outside Income Vary Widely

Various committees and offices have very different rules governing staff honoraria—or no rules at all. An increasing number of major committees and some members are placing tougher restrictions on staffers than members face, banning the acceptance of honoraria by staff totally, in several cases, and putting new limits on paid travel.

Some members have rules saying an aide can't accept an honorarium if he makes an appearance representing the member. Some committees bar honoraria, but permit travel.

The Senate Commerce Committee permits neither. "If we think the trip is important for committee business, the committee pays for it," staff director Ralph Everett said. The Senate Energy and Natural Resources Committee allows staff members to take speaking fees from trade groups, but not from individual companies. That's so there's "no appearance of being beholden to a certain company," said staff director Daryl Owen.

Vanda McMurtry, new staff director of the Senate Finance Committee, has told Democratic staff members they cannot take honoraria, but can travel as the guests of outside groups. The host can pay expenses, not entertainment, McMurtry said. The committee's rules also say staff members can't travel overseas, can't take a spouse along and can't travel while Congress is in session.

Arnold Punaro, staff director of the Senate Armed Services Committee, said his staff isn't permitted to take any speaking fees from groups in the defense industry or to own stock in defense companies.

Senators on the committee can and often do accept speaking fees from defense contractors, but Punaro said, "Members are elected and have to operate in a very public forum. The staffers are the behind-the-scenes people and we've got to make sure . . . we adhere to strong standards."

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members not to take money from groups that appear before the committee. Gottlieb said he lives by that rule; his fee for talking to the John Hancock Mutual Life Insurance Co. Sept. 25, for instance, was paid by the Washington Campus, not the company. And his boss, Sen. Donald Riegle (D-Mich.), is aware of his outside activities.

Gottlieb's speaking business is unusual for a Hill aide because it produces so much income and because he doesn't itemize the appearances, as required by Senate rules, in his financial disclosure statements.

Gottlieb already has made more money from speaking engagements so far this year, $37,500, than senators are allowed to earn all year in outside income—$35,800.

House Public Works counsel Sullivan, who is 72 and earns $82,500 a year from the committee, said in an interview that he takes honoraria because he needs the money. "I had seven kids and didn't get a raise once for eight years." In 1986, he said, he took $15,000 in speaking fees because "my daughter was getting married and we had some family medical problems."

He said he makes many speeches for free and limits most of his paid speeches to Washington. The trip to Chicago in April was arranged after he called Frank Moore, the former chief lobbyist for the Carter White House who is now vice president for government affairs at Waste Management, a major waste disposal firm. "I talked to Frank Moore and said I'd like to come .... I suggested if there was an honoraria available, if that could be done, fine."

Sullivan and his longtime executive assistant, Dorothy Beam, flew to Chicago April 3, spent much of the day with Moore and other Waste Management officials and returned to Washington that afternoon.

Their air fare, $358 each, was paid by the Public Works Committee. Sullivan prepared a one-page memo on the visit for Anderson, extolling the firm's technologies.

Asked why he should get an honorarium while on committee business in Chicago, Sullivan said, "Because I gave a separate talk on the side and it was legal."

Moore said neither Sullivan nor any House or Senate members who visit Waste Management's facilities make a formal speech.

The $2,000 fee was the standard one for members, he added.

Sullivan earned another honorarium while on committee business in California in August. He stopped at a breakfast meeting of the Anaheim Chamber of Commerce arranged by E. Del Smith, the city's lobbyist. Smith paid him $1,500 for the talk—three times the sum Smith usually pays members of Congress to speak.

Smith said in an interview that he paid Sullivan the $1,500 fee because of his expertise from more than 30 years on the committee staff.

Smith said he has never paid another staff member a speaking fee, but said of Sullivan: "He's special, a senior staff member, and an expert on infrastructure. It's like getting a professor at a university."

He added, "At least Dick Sullivan hasn't left Congress and gone with a big law firm and then come back and leveraged his contacts on the Hill like many other staffers do."

Gottlieb, who earns $84,886 a year from the Senate, estimated he makes between 60 and 80 paid speeches a year. But he no longer takes pay from groups whose interests are within the Banking Committee's purview, he said. "To do otherwise would be hypocritical."

Gottlieb said he doesn't itemize his honoraria income because the Senate Ethics Committee told him years ago to list speaking fees under one lump sum from his family firm, "Kevin Gottlieb and Associates."

Gottlieb said he had nothing to this effect in writing from the ethics committee, and could not remember who on the committee gave him this guidance.

This income was between $50,000 and $100,000 in 1986, when he was on Riegle's personal staff, and $132,650 last year, when he was off the government payroll running Riegle's reelection campaign.

Speaking and consulting last year helped boost his income to nearly $600,000. He received $105,000 for running the Riegle race and another $357,600 as president of the billboard trade association, the Outdoor Advertising Association of America.

Gottlieb said he is able to keep his busy schedule because he only sleeps four hours a night. "I'm not shortchanging the committee," he said, noting he works extra on committee business at the office or home if he takes time out for a speech. "I'm good at what I do."

It is impossible to calculate how much is paid to staff aides in honoraria, because many aides don't have to file financial disclosure statements. Only those who make more than about $65,000 a year or are a member's principal assistant must report their honoraria.

Many lobbyists and special interest groups who target staff members because of their important roles in drafting legislation don't offer honoraria, but invite staff aides on expense-paid trips to comfortable resorts, or for foreign interests, overseas.

W. Lamar Smith, Gottlieb's counterpart as minority staff director of Senate Banking, is one of the Senate staff's champion travelers. He took only two $500 honoraria last year, but listed 15 speaking trips paid for by groups with business before the committee. They included stays, often for several nights, in Honolulu; Key Largo, Fla.; Las Vegas and Palm Springs, Calif.

"I find the trips very beneficial," Smith said. "Since they pay for it, I usually stay more than a couple days to meet their people, see their exhibits." He added, "I thoroughly enjoy public speaking .... And it's not good for us to be in an ivory tower. Members are forced to get out in the real world. If we didn't travel to things like this, we'd live in an unreal world."

Gerald V. Halvorsen, head of the Interstate Natural Gas Association, a group of pipelines, offers both honoraria and trips to staff members. He said aides are invited because "staff, especially in the Senate, play a particularly important role in the legislative process and we want to get their views."

The association paid four Senate aides $1,000 each last year, plus expenses, for taking part in a panel discussion at the group's annual legislative conference at the Ocean Reef Club in Key Largo. "We offer honoraria to staff when we ask them to give up a weekend," he said.

Other staff honoraria recipients last year included Charles Kahn, a health care expert on the Republican staff of the House Ways and Means Committee, who reported accepting $7,300 in honoraria from medical groups. This year, for the first time, neither party's staff on the tax-writing committee is permitted to accept speaking fees.

Gail Fosler, then chief economist for the GOP staff of the Senate Budget Committee, collected $5,900 in speaking fees last year. Charles Riemenschneider, staff director of the Senate Agriculture Committee, reported receiving $2,000 for a speech to the Rice Millers Association and also attended its convention in Denver with his wife at the association's expense.

Ann Eppard, chief aide to Rep. Bud Shuster (R-Pa.), took $2,000 in fees from billboard companies. Shuster has taken nearly $15,000 in honoraria from the billboard lobby in the past several years and is considered its chief ally in Congress by its opposing lobby, Scenic America.

Williston Cofer, an aide on the House Armed Services readiness subcommittee, collected $1,500 and a $500 camera for three speeches to groups in the $16 billion-a-year military PX and commissary industry. The note on his $1,000 check from Webco USA Inc., of Alexandria, read "a little something for your time and trouble," Cofer said.

Increasingly, the lobbyists' attention is on "administrative assistants," the top personal aides to members of Congress. For example, Sandra Hanbury, chief aide to Rep. Michael Bilirakis (R-Fla.), took seven trips last year—two to Egypt, one to Greece and Cyprus, and four to New York—sponsored by banking and securities groups and by Bell South, a regional telephone company.

"There are definitely more trips being offered," said Hanbury, a 20-year Hill veteran. Interest groups recognize "a lot of legislation is written by the staff. We do the grunt work because the members are spread so very thin. My boss is on five subcommittees."

Other frequent fliers last year included James Conzelman, chief assistant to Rep. Michael G. Oxley (R-Ohio), who made three trips abroad, to Egypt, Taiwan and Brussels, and six domestically as a guest of telecommunications groups; J.W. Rayder, legislative assistant to Rep. Beryl F. Anthony Jr. (D-Ark.), a member of the tax-writing committee, who made nine trips as the guest of insurance companies, bond lawyers, contractors, and the savings and loan, electronics and public securities industries; and Emily Young, legislative director to Rep. Billy Tauzin (D-La.), who made eight trips to visit financial institutions, a power company, a telephone trade group and the waterway operators.

Scores of staff members reported taking trips to Taiwan over the past few years. More recently, the Peoples' Republic of China has entered the trip business. Rivals in other world hot spots sponsor competing trips, such as the Arabs and the Israelis, the Greeks and the Turks.

Robert Redding Jr., an aide to Sen. Wyche Fowler Jr. (D-Ga.), made it overseas to Munich as the guest of the National Peanut Council. He didn't return a reporter's call, but another Fowler aide said the trip was to discuss U.S. peanut exports to the European Community.

Staff researcher Melissa Mathis contributed to this report.

Mr. WERTHEIMER. To permit key congressional staff members once again to receive honoraria fees at the same time such fees are banned for Members of Congress is to provide an open invitation for private interests to try to funnel influence payments to these key congressional staff members past any honoraria restrictions that may exist.

The two-pronged test contained in the Frank and Glenn-Roth bills—the Frank bill in the House, the Glenn-Roth bill in the Senate—recognizes that the potential for conflict of interest or the appearance of conflict lies only partly in the subject of the activities for which honoraria may be paid. A greater potential for abuse may well lie in the interests of the party providing the honoraria. Failure to meet either of these conditions under this test correctly disqualifies the honoraria fee from being given.

Whether or not the two-pronged test will work to prevent honoraria fee abuses depends on the way in which Congress means it to be interpreted. For example, in the case of congressional staff covered by the two-pronged test, it must be clearly understood that any party providing the honoraria cannot have any interest that may be affected by the staff member receiving the honoraria. The test should be, can the congressional staff member affect or benefit the interests of the party providing the honoraria payment in any concrete way? If the staff member can affect events in a concrete way, the honoraria must be disallowed.

Congress needs to make explicitly clear through statutory language and legislative history just what it intends to allow and prohibit if the flat ban is to be revised. Congress also needs to make sure that any honoraria fees allowed are not subject to abuse.

The Glenn-Roth legislation excepts all career Government officials from the flat ban on honoraria fees even if the officials are in senior positions at GS–16 or above, such as senior executive service officials. We see no basis for treating top career and noncareer Government officials differently here, and we are opposed to this distinction in the Glenn-Roth proposal.

Effective oversight and enforcement is central to the effectiveness of any ethics laws and standards. Congress has had a questionable record over the years in this area. In order for a case-by-case approach to restricting honoraria for middle- and lower-level officials to work, there must be a commitment to carefully oversee the activities that occur.

The Government offices or congressional committees responsible for ethics oversight should be required by statute to monitor and review the honoraria's receipts that are filed to ensure that the law has been complied with. There should also be a requirement to file periodic public records that disclose the number of honoraria fees being paid, the amounts involved, the kinds of honoraria payments being received, and other information relevant to the way in which the two-pronged test is working, consistent with the confidential disclosure requirements that exist for middle- and lower-level Government officials and that are intended to provide privacy regarding the individual recipients' names and identities.

Any revisions need to be carefully monitored to ensure that the restrictions are working to prevent conflicts of interest and the appearance of conflicts and determine whether there is a need to

return to the flat ban on honoraria fees for all Government officials and employees that is currently the law of the land except for the Senate.

To sum up, we are opposed to any efforts to backtrack on the commitment to higher ethics standards contained in the 1989 act. Any effort to reverse the flat honoraria ban that is now the law of the land must continue that ban for high level officials in all three branches of government. It must also contain the strongest possible protections against honoraria fees creating conflicts for middle- and lower-level Government officials.

Thank you very much, Mr. Chairman.

Mr. MAZZOLI. Thank you very much, Mr. Wertheimer.

[The prepared statement of Mr. Wertheimer follows:]

PREPARED STATEMENT OF FRED WERTHEIMER, PRESIDENT, COMMON CAUSE

Mr. Chairman and Members of the Committee, Common Cause appreciates the opportunity to participate in these hearings and to provide our comments on the issue of public service and private honoraria fees in the federal government.

Common Cause has long taken the position that full-time public officials and employees should be fully and adequately compensated by the public they serve and should not be in paid relationships with private interests.

Apart from the conflicts of interest and appearance of conflicts that can and do arise when individuals entrusted with public service accept private fees, we believe that public officials should serve only one employer: the American public. As the U.S. Supreme Court recognized in upholding restrictions on public employees' outside income in United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961),

> The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose,

Congress has drafted a statute which speaks in very comprehensive terms.

This is a principle recognized in the executive order issued by President Bush in 1989 that prohibits the President's political appointees in the executive branch from accepting any outside private earnings whatsoever.

Common Cause supports and has worked for measures both to ensure high ethics standards in the federal government and to ensure appropriate salary levels for public officials.

For this reason, we strongly supported and worked for passage of the ethics-pay legislative package adopted in 1989, which resulted in the 1989 Ethics in Government Act.

The 1989 Ethics Act represents an essential step toward addressing critical ethics problems in Congress and ensuring the integrity of government on the whole. These problems will not be effectively addressed, however, until legislation is enacted to overhaul and clean up the campaign financing system.

In addition to providing a number of important ethics reforms, the Ethics Act, starting January 1 of this year, ended the wholly discredited honoraria fees system for House Members and staff, and officials at all levels of the executive and judicial branches of government.

The Ethics Act also provided major salary increases for the top officials in the three branches of government, except for U.S. Senators. We stated then, and continue to believe, that compensation for top federal officials in all branches of government should reflect the vital nature of these individuals'

responsibilities and role in society. The nation's top public servants are people who have been invested with the responsibility for leading and governing the nation. They make the laws of the land, interpret our laws and the Constitution, manage critical programs and run huge departments with thousands of employees.

While the salary increase was provided for top-level government officials, it generally was recognized that the increase would eventually lead to appropriate salary adjustments at the other levels of government as well.

The Senate, in excepting itself from the honoraria ban and a number of other ethics reforms in the 1989 Ethics Act, left itself in the wholly unacceptable position of having substantially lower ethics standards than the rest of the government. There is absolutely no way to justify this to the American people.

Last year, a measure sponsored by Senator Christopher Dodd (D-CT) to apply the honoraria ban to the Senate was adopted by a 77-23 vote in the Senate as part of comprehensive campaign finance reform legislation. The legislation failed to become law and Senator Dodd's measure is expected to be reintroduced soon.

We believe it is incumbent upon the Senate to move immediately to enact the Dodd proposal to ban honoraria. We also believe that any proposed legislation to revise the honoraria ban in the 1989 Ethics Act must include a provision to ban honoraria for Senators and thereby raise the ethics standards in the Senate to the same levels as the rest of the government.

Furthermore, we believe Congress needs to adopt further measures to ensure that travel reimbursements do not become another way for special interests to funnel personal financial benefits to public officials. At a minimum, though annual public disclosure is now required for reimbursed expenses, we believe that public disclosure must be required on a quarterly basis in order to provide contemporaneous knowledge of these activities.

Congress Intended A Flat Honoraria Ban

The 1989 Ethics Act abolishes the honoraria fee system for House Members and staff, and for officials throughout the executive and judicial branches of government.

Claims that Congress mistakenly or inadvertently applied the honoraria ban to certain middle- or lower-level government employees are erroneous.

The honoraria ban clearly was designed to ban honoraria outright for all federal officials and employees covered in the law.

The record of the 1989 Ethics Act is clear. Panels appointed by President Bush and by Congress to investigate and propose remedies for the deficiencies in existing ethics law recommended a flat honoraria ban for all government personnel. Here's what they had to say:

- The 1988 Commission on Official Compensation ("Quadrennial Commission") concluded that the "potential for impropriety in the present rules governing honoraria was so high that the practice of receiving honoraria should be eliminated." Its Recommendation #3 states, in part, "Congress should enact legislation ... to abolish honoraria (or payments that are the

substantial squivalsnt of honoraria) as a psrmissible source of outside sarned income for all three branches."

- Ths Presidsnt's Ethics Commission urged that Congress should "ban ths recsipt of honoraria by all officials and employees in all three branches of government." (emphasis added)

- Ths 14-membsr Houss bipartisan Task Force on Ethics asserted that "honoraria [should] be abolished for all officers and employees of the government." (emphasis added)

President Bush, in signing the Ethics Act, described the honoraria ban for fsderal employees as one of ths "[k]ey reforms in the Act."

Statutory rsstrictions on honoraria fees covsring all federal employees havs been in effect since 1974. The statutory definition of honoraria has been ths same throughout this period. The change that occurred in 1989 was to go from a $2,000 limit on honoraria fees per appsarance to a flat ban.

Ths honoraria ban reflects a judgment that honoraria fees had become such a dangerous vehicle for using money to obtain influence and for creating the appearance of impropriety that a flat ban was necessary to address the problem. Editorials in newspapers across the nation calling for an honoraria ban referred to ths honoraria system in such terms as "lsgalized bribery," "shamelsss pandering to special-intsrest payoffs," "bag monsy," "lobbyist payola," "appalling," a "disgrace" and a "low-lifs practice."

The honoraria ban doss not, in our view, violate constitutional protections of free spesch as some have argued.

The honoraria ban does not stop individuals from speaking. It does not stop articles from being publishsd. It does not stop

appearances from being made. It does bar federal officials and employees from being paid by private interests for these activities, except for reimbursement of travel expenses. We would like to submit for the record a copy of a brief submitted by Common Cause to the federal Court of Appeals in D.C. on the issue of the constitutionality of the honoraria ban.

Modification Of The Honoraria Ban

We supported the flat ban on honoraria fees for all government officials in 1989 and continue to believe it is the most appropriate way to deal with this critical ethics issue.

Last year, towards the end of the 101st Congress, some government employees, primarily middle- and lower-level executive branch employees, began raising questions about the applicability of the flat honoraria ban to their activities. This led to legislation sponsored by Senators John Glenn (D-OH) and William Roth (R-DE) to revise the flat honoraria ban for middle- and lower-level government employees. That legislation passed the Senate at the very end of the session but was blocked in the House.

The House's failure to deal with the matter was reportedly based on the position that all congressional staff, including senior staff, should be exempted from the flat ban on honoraria. Common Cause supported the Senate approach because it was limited to middle- and lower-level government officials and because it provided that high-level government officials, including senior congressional staff, would continue to be covered by a flat ban.

We recognize that over the years government ethics laws and rules have created higher standards for high-level officials. Those who serve in the most important positions and have the most responsibility in government are entitled to receive the highest compensation at appropriate levels for their positions. Similarly, the public is entitled to assurances that those same officials are held to and maintain the highest ethical standards.

This principle is reflected in the executive branch order barring any private, outside earned income for executive branch political appointees and is also reflected in various provisions of the ethics laws that apply to government officials and employees whose annual salaries are equal to or above the GS-16 level, or currently $72,298 and above.

We also recognize, however, and believe Congress must recognize that the honoraria fee system has become a particularly pernicious vehicle for private interests to make influence payments to public officials, payments that go directly to their personal financial benefit. Once a flat ban on honoraria fees is weakened, the door again is opened to potential abuse.

It is very difficult to draft language that allows honoraria fees while at the same time preventing them in all cases where abuses may occur. This is particularly true in the case of Congress; given their broad sweep of responsibilities, it is hard to imagine many circumstances where a party making an honoraria payment to a professional staff member of the House Ways and Means or Senate Finance Committees, or to the top staff aide of a

Member of Congress, would not have some interest that could be affected by that staff member's or aide's performance of their official duties.

It becomes all the more difficult to go down this path when the bodies responsible for overseeing and enforcing ethics rules have been lax in carrying out their duties and if the payments are not required to be disclosed to the public.

Weighing these considerations, Common Cause is prepared to support limited revisions in the flat honoraria ban under the following conditions:

1) High-level officials in the three branches of government whose salaries are equal to or above the level of GS-16 must continue to be subject to the flat honoraria ban to assure against any abuses occurring involving these key officials;
2) Middle- and lower-level federal officials must continue to be subject to an honoraria ban in situations where conflicts of interest or the appearance of conflicts may occur, and must continue to be subject to limits on the amounts of individual and aggregate honoraria receipts that may be accepted at a level no higher than those in effect prior to the 1989 Ethics Act; and
3) Requirements must be enacted to ensure that appropriate oversight and enforcement occur of the revised honoraria provision for middle- and lower-level federal officials.

We would like to discuss these conditions in more detail:

1. <u>High-level officials in the three branches of government whose salaries are equal to or above the level of GS-16 must continue to be subject to the flat honoraria ban to assure against any abuses occurring involving these key officials</u>.

We firmly believe that high-level officials must not be permitted to accept any honoraria fees.

High-level government officials, including senior congressional staff, have extensive responsibilities and help determine the direction of the federal government. They are of particular importance to private interests hoping to influence the government. Moreover, many are in highly visible positions and questions raised by their activities can have a serious impact on the public's trust in government. And at the GS-16 salary level -- currently $72,298 per year -- and above, these are government's highest paid officials.

Because these officials and staff are in such key positions in government, and because the honoraria fee system has become such a pernicious vehicle for abuse, the honoraria ban covering them must be foolproof.

Concern about the payment of honoraria fees to senior congressional staff had become a growing problem and was a public issue at the time that the flat honoraria ban was contemplated and enacted. For example,

- In 1987, two top House aidee to the then-House Speaker and the House Minority Leader "embarked on a trip to Oklahoma and Texas in which they collected $28,000 in epeaking fees in two days, more honoraria than moet membere receive in a year," according to The Washington Post. The money came from "contractore, engineers and a karate uniform maker."

- The staff director of the Senate Finance Committee received a total of $37,550 for speechee in 1985 and 1986 from "groups eager to learn of the [1986 tax reform] meaeure's detaile," according to The Wall Street Journal.

In addition, a banking aide to Senator Donald Riegle (D-MI) received $132,650 for speeches in 1988 during an 18-month break from the Senate etaff, during which he directed Senator Riegle'e reelection campaign before returning to be staff director of the Senate Banking Committee, according to The Washington Post.

The conflicte of interest raieed by congreeeional staff honoraria were noted in numerous media accounte. For example, a column in National Journal observed, "Hill aidee often have a hand in decisions that directly benefit, or hurt, epecial intereete. If, with the eame hand, they are raking in freebies and speaking fees ... just whose intereste are being eerved?"

To permit key congreseional etaff membere once again to receive honoraria fees, while such feee are banned for Members of Congress, is to provide an open invitation for private intereste seeking to influence Congreee to try to funnel influence payments to theee key etaff membere past any honoraria restrictions that exist.

We, therefore, are oppoeed to the legielation introduced by Representative Barney Frank (D-MA), H.R. 325, in ite current form. The Frank bill exempts all government employees, other

than Members of the House, judges and presidential appointees subject to Senate confirmation, from the flat honoraria ban. We believe that high-level congressional staff as well as high-level officials in the other two branches of government must be covered by a flat ban on honoraria, a position not reflected in the Frank legislation.

In its current form, we would note, the Frank bill would exempt the White House staff, which is not subject to Senate confirmation, from the honoraria ban. We believe both the White House staff and senior congressional staff must be subject to the statutory flat ban on honoraria.

2. Middle- and lower-level federal officials must continue to be subject to an honoraria ban in situations where conflicts of interest or the appearance of conflicts may occur, and must continue to be subject to limits on the amounts of individual and aggregate honoraria receipts that may be accepted at a level no higher than those in effect prior to the 1989 Ethics Act.

In moving to any system that allows or disallows honoraria fees to be accepted based on the circumstances of each individual case, Congress must establish sufficiently restrictive standards to prevent conflicts of interest or the appearance of conflicts from occurring. This is an inherently difficult task.

Legislation proposed by Senators Glenn and Roth provides a two-prong test to protect against inappropriate honoraria fees

for middle- and lower-level federal employees. Under the Glenn-Roth amendment, these employees are permitted to receive payments for speaking, appearances or writing articles only under the following conditions:

- "the subject of the appearance, speech, or article and the reason for which the honorarium is paid is unrelated to that individual's official duties or status as such officer or employee"; and
- "the party offering the honorarium has no interests that may be substantially affected by the performance or non-performance of that individual's official duties."

The two-prong test recognizes that the potential for conflict of interest or the appearance of conflict lies only partly in the subject of the activities for which honoraria may be paid. A greater potential for abuse may well lie in the interests of the party providing the honoraria. Failure to meet either of these conditions under this test disqualifies the honoraria fee from being given.

Whether or not the two-prong test will work to prevent honoraria fee abuses depends on the way in which Congress means it to be interpreted. For example, in the case of congressional staff covered by the two-prong test, it must be clearly understood that any party providing the honoraria cannot have any interests that may be affected by the staff member receiving the honoraria. The test should be: Can the congressional staff member affect or benefit the interests of the party providing the honoraria payment in any concrete way? If the staff member can affect events in a concrete way the honoraria must be disallowed.

It is essential that Congress make explicitly clear, either through the statutory language itself or through a combination of the statute and the legislative history, just what it intends to allow and prohibit. It is also essential that Congress makes sure that any honoraria fees allowed are not subject to abuse. And in any event, honoraria permitted for middle- and lower-level government employees must not exceed the statutory limits in place prior to the 1989 Ethics Act.

The Glenn-Roth legislation provides a two-pronged test for those employees whose salaries are at the level of GS-16 or below. The proposal, however, excepts all career government officials from the flat ban on honoraria fees, even if the officials are in senior positions above the GS-16 level, such as Senior Executive Service officials. We see no basis for treating top career and non-career government officials differently and we oppose this distinction in the Glenn-Roth proposal. Top-level career executive branch officials hold important positions of responsibility and authority, are paid the highest salaries and should be subject to the highest ethical standards.

3) Requirements must be enacted to ensure that appropriate oversight and enforcement occur of the revised honoraria provision for middle- and lower-level federal officials.

Effective oversight and enforcement is central to the effectiveness of any ethics laws and standards. Congress has had

a questionable record at best over the years in this area. In order for a case-by-case approach to restricting honoraria for middle- and lower-level officials to work, there must be a commitment to carefully oversee the activities that occur.

Public disclosure is often a key factor in assuring that ethics rules and standards are met. Under existing ethics statutes, however, public financial disclosure requirements currently only apply to government officials paid at the level of GS-16 or above.

The Glenn-Roth bill provides for confidential disclosure to be made to the appropriate oversight bodies of honoraria fees paid to government officials and congressional staff subject to the two-prong approach. If this approach is to be followed, then it is essential that the government offices or congressional committees responsible for ethics oversight be required, by statute, to monitor and review the honoraria receipts that are filed to ensure that the law has been complied with.

In addition, we believe these ethics oversight and enforcement bodies must be required by statute to make periodic public reports that disclose the number of honoraria fees being paid, the amounts involved, the kinds of honoraria payments being received and other information relevant to the way in which the two-pronged test is being met, consistent with the confidential disclosure requirements that are intended to provide privacy regarding the individual recipients' names and identities.

These measures will help ensure that the honoraria restrictions are being interpreted as intended and will inform

the public about the kind of honoraria payments being made to public officials.

Conclusion

In January, Members of the House and senior officials in the executive and legislative branches of government began receiving the full 35 percent salary increase adopted in 1989 as part of comprehensive legislation that also ended the honoraria fee system and brought about other key ethics reform measures.

Common Cause supported the salary increases and the ethics reform each on its own merits. But we felt it was essential in undertaking the process of upgrading the compensation levels for all three branches of government that effective ethics reforms be adopted to help restore public confidence in the integrity and fairness of government. At the core of these reforms was the provision to ban honoraria fees outright and eliminate what had become a pernicious vehicle for private interests to make influence payments to public officials.

Common Cause strongly opposes any effort to backtrack on the commitment to higher ethics standards contained in the 1989 ethics-pay legislation. Any effort to reverse the flat honoraria ban that is now the law of the land must continue that ban for high-level officials in all three branches of government, including senior congressional staff. It must also contain the strongest possible protections against honoraria fees creating conflicts of interest and the appearance of conflicts for middle- and lower-level government officials.

Furthermore, any revisions must be carefully monitored to ensure that the restrictions are working to prevent conflicts of interest and the appearance of conflicts and to determine whether there is a need to return to the flat ban on honoraria fees for all government officials and employees that is currently the law of the land.

Mr. FRANK. Mr. Gekas, the gentleman from Pennsylvania.

Mr. GEKAS. Yes.

In the two-pronged tests about which we are speaking, do you contemplate prior approval or a filing which puts the speaker, shall we say—the receiver of the honorarium—under the gun for a later investigation ex post facto? Do you contemplate prior approval if he would submit and say, "Six weeks from now, I'm going to make it, and here it is; this is the offeror, and this is the subject matter; and may I do it?" or does he go ahead and do it and file that he has done it, and then it is up to the Congress and the Ethics Committee and the ethics bureau to determine whether or not he, that individual, has violated the statute?

Mr. WERTHEIMER. The statute, as drafted, does not require prior approval. The prior approval would provide a better opportunity for avoiding abuses from occurring, and it certainly is something that the committee should consider. It is a process that would, as we say, require, mandate, monitoring the honoraria receipts that are being received to make sure that the provision is being complied with.

Mr. GEKAS. I am afraid that, in conjuring up this particular way of enforcing it, we have to hire another thousand people to make sure that each request is met timely for prior approval. I am not sure, but I am willing to advance that theory, at least, in the opening parts of consideration of this bill. Do you see any overburden to those who would have to grant those prior approvals?

Mr. WERTHEIMER. I don't necessarily believe that this would require substantial increases of staff. There may well be prior approval systems that exist in various agencies now for certain kinds of activities. In the executive branch, there are processes for reviewing matters that might cause conflict of interest.

Of course, part of this depends on how tight this second level restriction is drawn to make sure that there aren't matters dealing with conflict of interest. This is a very complicated problem, depending on the scope of responsibilities of the people involved. The narrower the scope they may have, the broader the exemption would be, but the broader the number of issues that they may have some ability to work on, then, in effect, the more limiting capacity that this provision would provide for anyone to receive any honoraria fees.

Mr. GEKAS. I mean to try to advance that theory as far as it will go—not theory, but provision, about prior approval. Do you have any reference to that in your opening statement, on prior approval?

Mr. WERTHEIMER. We do not.

Mr. GEKAS. I would ask you, if you don't mind, to give us a written opinion on that portion of it, assuming that we grant exceptions at all. I am pretty sure, from what I hear today, that this committee is moving toward that, although I am grudgingly listening to the possibilities. If we do, your, to repeat, GS-16 seems like a good cutoff point. And the other is that we simply try to monitor and enforce anything under that.

Military officers, you know, are given a different distinction from the GS-16; it is an 07 or above. On that section, do you agree with that particular portion of the Frank bill?

Mr. WERTHEIMER. Our understanding was that we were talking at salary levels at the level of GS–16 and above for all covered people. Is that correct?

Mr. GEKAS. I'm not sure.

Is 07 comparable to GS–16?

Mr. MAZZOLI. The staff advises us, that is not the intent of the Frank bill.

Mr. WERTHEIMER. Well, we will take a look to see if we have anything to add on that.

Mr. GEKAS. Yes, that would be helpful also.

I have no further questions, Mr. Chairman.

[The information follows:]

Common Cause

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ARCHIBALD COX
Chairman

FRED WERTHEIMER
President

JOHN W. GARDNER
Founding Chairman

February 26, 1991

Honorable George Gekas
U.S. House of Representatives
Washington, DC 20515

Dear Representative Gekas:

At the February 7 hearing of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, you requested the views of Common Cause regarding whether federal officials permitted to receive honoraria fees should be required to obtain prior approval.

Common Cause believes effective oversight and enforcement is central to the effectiveness of any ethics laws and standards. Congress, in particular, has had a questionable record over the years in this area. In order for a case-by-case approach to work, there must be a commitment to carefully oversee the activities that occur.

As you know, Common Cause strongly believes that all government officials in all three branches of government whose salaries are equal to or above the level of GS-16 (currently $72,298) should be covered by a flat ban. We also believe that, before an honoraria fee may be accepted by a federal official not covered by the flat ban (i.e., those at salary levels equal to or lower than GS-15), it makes sense to require prior approval from the appropriate agency official.

Requiring prior approval -- based on statutory standards to protect against conflicts of interest and the appearance of conflicts of interest -- will help ensure that these fees do not become a vehicle for private interests to make influence payments to public officials and are not inconsistent with full-time public service. Similar preclearance requirements exist for other outside earnings to ensure that there is no potential for conflict of interest or the appearance of conflict and should be implemented with regard to honoraria.

We hope this information will be helpful and appreciate the opportunity to share our views with you.

Sincerely,

Fred Wertheimer
President

Mr. MAZZOLI. Thank you.

The gentleman from Rhode Island.

Mr. REED. Thank you.

Mr. Wertheimer, is it fair to say that if the exemption were limited to employees under GS–16, that you could support the present Frank legislation?

Mr. WERTHEIMER. The present Frank legislation, yes, in substance.

As I say, the GS–16 question, in effect, that is the bill that exists in the Senate, but there we have proposed some modifications to make sure that it covers the senior executive service, for example. But we would be prepared to support it. We are concerned about it, and obviously there are different sets of concerns being brought to this committee today. We view it with concern. We believe that the enforcement part of this is very important, and we would add language to it regarding the monitoring and oversight part of this process to make sure that it would monitor. But in basic, we testified yesterday in the Senate in support of a GS–16 and above approach.

Mr. MAZZOLI. Would you yield for just a second?

Mr. REED. Yes, Mr. Chairman.

Mr. MAZZOLI. Just hear me out, Mr. Wertheimer. I thought you said in your statement that you would be pretty much adamantly opposed to any change with respect to the senior congressional staff who currently are prohibited.

Mr. WERTHEIMER. We are using the GS–16 level salary for them as well.

Mr. MAZZOLI. For them as well.

Mr. WERTHEIMER. We are talking about in all three branches of government, the same level.

Mr. MAZZOLI. So when you say "senior" or "key,"—as I think you have used sort of interchangeably—lower-down members of the staff you don't think have the same potential to compromise or to——

Mr. WERTHEIMER. Yes, we do.

Mr. MAZZOLI. So your preference would be to have a continually flat ban.

Mr. WERTHEIMER. No. We are concerned; I have expressed those concerns here, and I think the committee should be concerned; I think there is a potential problem here; I think, therefore, it has to be carefully monitored; but, on balance, we are prepared to support an approach.

I think the problem becomes particularly difficult in Congress because of the scope of responsibilities that exist in this institution that don't necessarily exist for a GS–14 who works in the Agriculture Department but which do exist for someone who may be below the salary level of GS–16 in Congress but still may be in a position to be able to affect—depending on where they are—a broad range of areas and, therefore, potentially could become a conflict.

Now, to protect against that, you have the two-pronged test, but that two-pronged test becomes tricky business to interpret, to apply, and to make sure it is enforced.

So, on balance, we worry about it, but we are prepared to support it.

Mr. REED. Thank you, Mr. Chairman.

Mr. MAZZOLI. I didn't want to take the gentleman's time.

Mr. REED. It is quite all right, Mr. Chairman.

Mr. MAZZOLI. Thank you.

Let me, Mr. Wertheimer, thank you. I have a question or two, but I know sometimes you have had to play the somewhat ignoble or difficult role of skunk at the lawn party, but I think that you and your group have played it very well over the years, and I think you do cause us to have to think and rethink our proposition.

I am going to be interested to read your testimony—which I apologize for not having read—with regard to the references to the intent of Congress, because, while that should not be the overwhelming factor here, sometimes we intend to do things which, in retrospect, we shouldn't have ever intended to do. This bill was just relatively recently passed, so it is not exactly as if a whole sweep of history has intervened, and if we intended to do something and now we are moving 90 degrees away from it, I would have to worry.

The other thing that you mentioned which I think is very important is, I think you said something to the effect that once the door is open, for whatever righteous purpose, their tendency is to knock that door open for perhaps other, less righteous purposes. It does cause me some concern about quickly retrenching on this issue, after having come through what we came through, and, as you point out, the Senate hasn't even gotten there yet, to the point that we got to last year. So I have personally some concerns about doing anything which might be the wrong movement at this particular point.

Also, going back to what you said about staff, that was my very point. Depending on the pay scales—because, you know, Members of Congress are virtually unlooked at, as far as what pay scales they set up for their offices, what way the offices are arranged, what responsibilities come. They have virtually plenary power to set up their offices, which suggests that, depending on which office, from which State of the Union, and which pay scales, you can have very, very influential people who make far less than whatever this cut-off figure of 70-some-odd-thousand dollars is. So when you start putting up these various mechanisms, you do open the door.

I was just, once again, wondering if you have any guidance for us on the kind of wording that might be used to identify jobs when they have with them the authority that might not go typically with that sort of a job but might still need to be covered by this prohibition.

Mr. WERTHEIMER. Not beyond what I have said already, Congressman. As I have said, when you get to Congress and staff in Congress, they have the potential for broad responsibilities within an office, on a committee, and it will become essential, if this route is followed, to make sure that this two-pronged test for people below a certain salary level, if that is the route you go—and that is the route we strongly urge—that it be monitored carefully and that it be strictly interpreted.

The role of honoraria for congressional staff has been growing in the most recent years. When you ban a Member of Congress from accepting honoraria and leave the door open for congressional staff,

those who are interested in trying to use honoraria as part of trying to lobby or influence the process will naturally turn to congressional staff, and, given the opportunities to do so, the potential for problems is there.

Mr. MAZZOLI. Thank you very much.

The gentleman from Pennsylvania.

Mr. GEKAS. The recent phenomenon in this Persian Gulf War of general after general appearing on ABC, CBS, and so forth, retired now, but, nevertheless, receiving Government pensions, who are paid consultants for these news shows, have you thought about that at all? Are they, in any way, in their giving of their opinions on whether there should be a land war, or a bomb war, or whatever, or missiles, as the Englishman would say—are they in any way involved in all of this, Mr. Wertheimer?

Mr. WERTHEIMER. Not to my sense. We have looked at the questions of revolving doors, as has the Congress, and we have supported provisions to providing cooling off periods; once you are past the cooling off period, in our view, that is the balance, and people go out in the private sector and do as they think makes sense.

Mr. GEKAS. I have no further questions.

Mr. FRANK. I appreciate that, and I would say to the gentleman, too, to the extent that we have had problems, frankly, people who stand up publicly and give their opinions have generally been the last people we have worried about; it was the people who were off doing things that we might not have any idea about who would be the problem.

Because I was out and I don't want to delay things further, I appreciate it, and we will get back to Mr. Wertheimer on these subjects. I understand the testimony again focused on those areas which I think are the ones that we might have some disagreements on. That shouldn't obscure the fact that there is a large area of agreement, and we will move ahead.

The one question I would raise is this. I gather the question of prior approval came up again. We discussed that last year. One of the issues that will come into that will be what OGE will tell us, and we will ask OGE, if they are still here, to let us know, if there were to be a prior approval, what kind of mechanism they would set up. Obviously, it would have to be one which didn't slow people down. So the question would be, what categories? all categories? and how quickly they could process a request. That would be a critical part of it.

Thank you.

Mr. WERTHEIMER. Thank you, Mr. Chairman.

Mr. FRANK. We will now call forward our panel: The National Treasury Employees Union, the American Federation of Government Employees, the National Federation of Federal Employees, and the Senior Executives Association.

Please come forward.

I want to make one statement, because people have been asking members and others during the hearing whether there were complaints about some of the other restrictions before this.

One thing that I think should be clear—and I will ask people to submit them if there are examples that I'm not aware of—but prior to the enactment of this in 1989, and through much of 1990

when it was going into effect, I'm not aware there was any pattern of complaints that Federal employees were abusing the powers that they then had. I think we want to look at both. But just as there were very few complaints about the restrictions that were in existence before this statute was enacted, it is not my impression that there was any pattern of abuse that anyone alleged of Federal employees being corrupted or engaging in corruption. If anyone has examples of abuses like that in the period before this statute was adopted, it would be useful for us to know whether there is such a problem. As I said, it's my impression that there wasn't.

We will begin with Mr. Tobias.

STATEMENT OF ROBERT M. TOBIAS, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you very much.

My first point, Mr. Chairman, is just that. The law, as enacted, is an intrusion, a very large intrusion, on the off-duty conduct of Federal employees. And in order to support that kind of intrusion, there has to be some kind of a rationale. We have been unable to uncover any misuse under the prior law, and no one has alleged any misuse. There is no documentation of any study of misuse that Congress did prior to the enactment of this law, and for the employees that we represent in the 16 agencies, 140,000 people, these agencies have prior approval mechanisms. So, in order for any employee to participate in outside employment, they must first request permission to engage in outside employment and receive that permission, and then they engage in it. So, we have employees who have received this permission, have been engaging in these activities, and now we have a law which arbitrarily cuts off that source of income.

The second point I want to make is that this law takes away supplemental moneys. Several of the people that we represent in the lawsuit that we filed are lower grade Federal employees who have counted on the extra income through writing and appearances to supplement their income. It is totally unfair when someone received a 4.1-percent pay increase and at the same time, in some of these cases, suffered a 33-percent loss of income because of the impact of this law.

Third, I think the result of this law is arbitrary. There are several examples in the testimony that I have provided. For example, Seledia Shephard sells greeting cards. Now, is the line on a greeting card fact, is it fiction, it is poetry, is it an essay? Does it constitute an appearance when Ms. Shephard goes and tries to sell these cards? She doesn't have an answer, but the answer that she does have is that she can't do anything right now.

Sharon Kennedy does theater reviews. It is OK to do theater reviews if you're employed and you have a contract with the newspaper. It is not OK to do theater reviews if you do it on a freelance basis.

I would ask, what Government purpose is served by making that kind of a distinction? I would suggest there is absolutely no Government purpose, and it has an arbitrary impact on Federal employees.

Certainly Jan Adams Grant, who writes about environmental issues to supplement her income, and who works for the Internal Revenue Service, is a prime example. It is particularly egregious for Ms. Grant because she's a seasonal employee. She only works for the Internal Revenue Service for 7 months out of the year, but this law applies to her 12 months out of the year. So even when she's on furlough from the Internal Revenue Service, even when she's not working, this law applies to her and she can't supplement her income through the receipt of honoraria. I think that is incredibly unfair and arbitrary as it impacts on her.

So, for these reasons, Mr. Chairman, we support the legislation that you have introduced and hope that it can be enacted just as soon as possible.

Thank you.

Mr. FRANK. Thank you. If there is no objection, all the written statements will be put in the record. I appreciate your homing in exactly as you did.

[The prepared statement of Mr. Tobias follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. Chairman, Members of the Committee, I am Robert Tobias, National President of the National Treasury Employees Union. NTEU is the exclusive representative of over 144,000 loyal federal employees -- employees who are deeply troubled by the broad new prohibitions restricting their abilities to pursue their private avocations on their own time. NTEU applauds the swift actions you have taken to review this ban and it is my pleasure to share NTEU's thoughts with you here today.

As you know, since the latter part of 1990, NTEU has sought relief from the honoraria ban through the courts. Last Tuesday, we presented our case before the U.S. Court of Appeals for the District of Columbia Circuit, seeking to prevent the government from enforcing this arbitrary and irrational ban on the receipt of honoraria by even the most junior federal employee. It is our belief that the government has not provided an adequate rationale for such a broad prohibition. The ban will have the practical effect of preventing most federal employees from pursuing outside speaking or writing. Most employees will not be able or willing to donate their time and skills to continue writing or speaking without compensation. Should the government wish to restrict rank and file federal employees' ability to pursue avocations in their off duty time, as well as regulate the speech of its employees, at a minimum, it must show that the receipt of payment for articles

or appearances in some way substantially impedes those employees' performance in their federal position. Not only has no evidence of an actual impact on perfqrmance been shown, but as far as I know, there is no indication of any public perception that honoraria abuse among federal employees even exists.

Furthermore, a review of the legislative history surrounding passage of the Ethics Law presents a bit of a puzzle. There is no clear indication that Congress was even concerned with improprieties by lower level government employees. In fact, since the broad scope of the honoraria ban has become widely known, a number of Members of the House and Senate have used terms such as "counterproductive", "unintentionally far reaching", and just plain "mistake" to describe the new law's effects on rank and file federal employees.

Even the Office of Government Ethics, which is responsible for drafting the honoraria regulations and overseeing the new ban, has called for its speedy review and correction. The Ethics Office's own Director, Stephen Potts, has termed the extension of the honoraria ban to lower level federal employees a "mistake" that is "not necessary to protect the integrity of the government."

Potts is, indeed, correct that the legislation is unnecessary. The range of allowed activities by federal employees has long been limited by conflict of interest laws. Existing regulations

prohibit federal employees from engaging in ANY activities that would raise even the appearance of a conflict with their official duties. Prior to the enactment of the honoraria ban, the government had the tools necessary to insure against any actual or perceived impropriety by federal workers and they will continue to retain that right after the Ethics Law is amended.

Moreover, NTEU has not opposed these scope of employment rules in the past and does not oppose them now. However, on January 1 federal workers became subject to harsh penalties for pursuing many innocent hobbies for which they might normally receive payment. And this we do oppose.

Federal employees continue to be able to moonlight in second jobs as long as their outside employment does not interfere with their federal responsibilities. Yet, other off-duty practices that employees have engaged in for years and have caused no ethical problems are suddenly taboo. The distinctions that have been drawn appear to have no rational basis. Even the regulations implementing the honoraria ban are a myriad of confusing do's and don'ts.

For example, Gary Ramage, an NTEU member and staff attorney for the Social Security Administration in Indianapolis, has previously received permission to practice law in his free time in subject areas unrelated to his employment. It is possible that he

will be required to make occasional court appearances incidental to that practice of law. Do such court appearances fall under the strict prohibition in the honoraria ban against appearances or are they merely incidental to his practice of law? This remains an open question subject to interpretation by federal agencies and confusion by the affected employees.

The case of Seledia Shephard, an education program specialist at the Department of Education, presents another example of the confusion that has been created. Ms. Shephard creates and sells greeting cards during her spare time. No one can tell her whether the continuation of this practice will subject her to the $10,000 fine associated with violating the honoraria ban.

NTEU member Sharon Kennedy enjoys writing and receiving payment for theater reviews in her free time. As an Equal Employment Opportunity Specialist with the Department of Health and Human Services it is difficult to envision the conflict of interest that is created by her accepting theater tickets and payment for the shows she reviews. Yet this activity is prohibited by the ban.

The effects of the ban are equally ridiculous for Jan Adams Grant, an NTEU member and seasonal tax examining assistant with the Internal Revenue Service. Grant has obtained permission from the IRS to both write and speak on a variety of environmental topics.

It is difficult to understand what evil is corrected by prohibiting Grant from receiving income for a non-fictional account of the lives of wolves in Yellowstone Park. Yet, if Grant fictionalizes the story by the addition of a character such as Mowgli, the young lad raised among the wolves in the well known children's story, Jungle Book, then no violation of the law has occurred. It is equally illogical that the regulations permit an employee to receive compensation for writing a fictional article for publication, while expressly prohibiting payment for that same fictional story recounted in the form of a speech.

In short, it is not enough that throughout every budget cycle federal employees must worry about their pay, their benefits and whether or not they are likely to be furloughed; now they are being told what is allowed even when they are on their own time and in no danger of compromising their federal positions. This represents a totally unnecessary intrusion into the private lives of federal employees and cries out to be addressed without delay.

Clearly , it was not Congress' intent to subject the bulk of federal employees to such a harsh and overly broad honoraria ban. NTEU supported efforts to fix this section of the Ethics law late in the last session and although those efforts were not successful, it remains imperative that current law subjecting federal employees to harsh penalties for pursuing innocent hobbies for which they are paid be reviewed and repaired without delay.

Thank you for your efforts in this regard on behalf of all federal employees. I will be happy to answer any questions you might have.

Mr. FRANK. Next we will hear from Mr. Roth, general counsel of the American Federation of Government Employees.

STATEMENT OF MARK D. ROTH, GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. ROTH. Mr. Chairman, AFGE represents over 700,000 employees in virtually every executive branch agency, and I must tell you I had no idea how diverse their activities were until the ban was enacted and they started calling.

We have firefighting ministers and people who engage in art reviews, travel writing, gourmet bakers, and the one question I couldn't answer was the babysitter: Is infrequent babysitting an appearance or is it outside employment?

We have challenged this ban, also. Although we fully recognize that employees' exercise of first amendment rights have been restricted in the past and they're not new, I want to make it clear to the members of the committee that for career employees of the executive branch the choice isn't between the honoraria ban and no regulation of their conduct. For many years employees have been under very extensive regulations, agency by agency; broad rules in the Code of Federal Regulations. Agencies have internal appeal mechanisms. Many, as we have said, require disclosure, depending on the job and the outside activity.

There is a case-by-case determination now in any close case. It is not only a regulation of employees' conduct and their outside activities, but these regulations cover where you have a spouse or an immediate family member. A lot of times you must divest yourself where there is a conflict with a spouse's employment.

So there are currently very, very extensive regulations of employees' conduct, and I think that's why we haven't had the problems with conflicts of interest. It is not just where there's an actual conflict, by the way. It is where there's an appearance of a conflict. That is very, very broad as a test.

In our view, the Government must be able to show that the employee's outside speech activities somehow impede the performance of the employee's official duties or somehow interfere with the regular operation, discipline or delivery of services to the public by the Government. That is where the content of what they are doing or where the person they're doing it for is interested or has an interest in their official duties.

As far as the tests that you currently have, I have just one caveat. We would prefer to see the line drawn where the activity is either unrelated to an employee's official duties or if the honorarium is not paid by a potential agency client; that the test be more of an "or." Because you do have situations where employees are experts in a field and they do go out and speak one time to people who would never be before them—law students, fraternal organizations, or just doing seminars for for-profit seminar companies. But as far as the people they are providing the seminar to, the training course too, there is no direct contact there and no money changes hands. So I think your proposed prohibition may be a little bit broad as written.

I note in closing that some of the proposed measures cut the line off at GS–16. We don't favor that because we don't see that a restriction delineated simply by grade or pay would meet the constitutional test of strict scrutiny. There should be something in there about the scope of the person's duties. Whether it's a GS–16, because they are a scientist and their skills are just so rare that they get that amount of pay, versus someone who is a policymaker, I think your real fear and Common Cause's would be with the policymakers.

In our view, placing restrictions on the amount of honoraria is unconstitutional—and we acknowledge that there has been an honorarium restriction on amounts since 1974. With respect to our members, I think it's $2,000 an appearance and we haven't challenged it because no one has ever reached it. But I think if you're reviewing this area, you shouldn't leave that untouched. There is no reason why $2,000 is a magical number today, or even was in 1974.

We would hope that the legislation that's enacted would have a retroactive effective date, because we believe the law, as written, is not only unconstitutional but has been unfair. Employees are just now even finding out about it. They have been engaging in innocent, routine activities for many years, which they have continued since January 1, and we believe the threat of fines of up to $10,000 should be lifted by making it a retroactive bill.

Thank you.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Roth follows:]

Prepared Statement by American Federation of Government Employees, AFL-CIO

Mr. Chairman and Members of the Committee:

I am Mark D. Roth, General Counsel of the American Federation of Government Employees, AFL-CIO. AFGE represents over 700,000 employees in approximately 105 different Executive Branch agencies. The diversity of AFGE's membership makes it uniquely qualified to address the issues being considered here today and I appreciate the opportunity to present our views.

At the outset, I would like to thank you, Mr. Chairman, and to commend you and the other members of the Congress who have acted so quickly to introduce legislation soon after the 102nd Congress was convened to correct the inequity caused by Title VI of the Ethics Reform Act of 1989. We are referring to the ban on the receipt by federal employees of honoraria for speeches, publication of articles and appearances. Enactment of Title VI results in the creation of more than just an inequitable situation. We believe it is, in fact, an unconstitutional provision and for that reason, we believe that it is absolutely imperative that action be taken immediately to amend the provision so that it will unequivocally pass constitutional muster.

In November, 1989, Congress passed the Ethics Reform Act of 1989 including Title VI of that Act which is entitled "Limitations on Outside Employment and Elimination of Honoraria." Title VI became effective on January 1, 1991. Title VI was, in essence, a <u>quid pro quo</u> for the 25% pay raise granted to Members of Congress and top Government officials. Quite simply, the pay raise was conditioned upon acceptance of a ban on the receipt of "honoraria" and certain limitations on the receipt of outside earned income. It is interesting

to note that the restrictions on outside earned income are only applicable to Government employees whose salaries are comparable to a GS-16 and above. The ban on honoraria, however, was not limited to that class. It applies to all Executive Branch employees. And, it is not restricted to honoraria paid to employees because of the positions they hold or the official duties they perform. In other words, Title VI is a broad, blanket prohibition which can effectively preclude the exercise of an employee's First Amendment rights of free speech. There is no necessity for a nexus to exist between the speech, appearance, or article and the performance of the Government's business; no necessity for a finding that the Government's needs are such that they tip the scales or outweigh the employee's right to exercise certain constitutionally guaranteed First Amendment rights.

Restrictions or limitations on employees' exercise of their First Amendment Rights are not new. For many years, agencies have had the unequivocal right and responsibility to curtail any actions of employees which create a conflict of interest or even the appearance of one, with the agency's policies and programs. These limitations, however, have effectively been handled under the issuance of agency regulations rather than through explicit statutory provisions. Outside of these reasonable limitations, employees were permitted and, in fact, encouraged to engage in teaching, lecturing and writing on all topics which did not conflict with the performance of their official government duties.

The only statutory prohibition has been a limitation on the amount of an honorarium an employee could receive. This provision was in existence prior to the passage of the Ethics Reform Act of 1989. Under it, employees were precluded from receiving more than $2,000 for any one appearance, speech or article. We believe that this, too, presents a constitutional problem in that it could have a chilling effect on the exercise of First Amendment rights without the requisite nexus between the limitation and the performance of the Government's business. However, it had not been challenged nor did it pose a problem for most rank-and-file employees because the amount of honoraria which they received for various activities was usually significantly lower than the threshold amount of $2,000.

When our members became aware of the Ethics Reform Act, they were shocked to learn that they could no longer receive honoraria for the activities they had long been undertaking. For some, this meant that they would have to stop engaging in certain activities altogether because the loss of the honoraria makes them impractical or impossible to undertake. For instance, one of the plaintiffs in the law suit AFGE has filed, to challenge the constitutionality of the honoraria ban, is an employee who writes travel articles for various publications. He receives honoraria for the articles which are published and then uses the honoraria for travels to various places in the hope that he will obtain enough information to write another article which someone will publish. In this instance, there is absolutely no relationship between the writing and publication of the travel articles and this employee's

performance of his official duties. There is no connection between the Agency's policies and the articles and there is no rational reason which could be put forth to support the honoraria ban. In this case, it is simply an unconstitutional restriction.

The outside writing and speaking activities of federal employees, of AFGE's members, are as diverse as are the jobs they hold. Last week four of AFGE's districts held a training conference in Nevada. There were a number of workshops on a variety of topics for our members. One of the workshops was especially for federal fire fighters. Those federal fire fighters who attended came from the Department of Defense, NASA and the Department of Veterans' Affairs and they were bound together by the common element of their fire fighting duties. However, they were uniquely different. On Thursday evening a banquet was held for all who attended the training conference. The invocation was offered by one of the fire fighters who was introduced as the "Reverend...." If the honoraria ban were imposed literally, I can't help but wonder how it would affect this General Schedule fire fighter's occasional Sunday preaching activities. I simply could not perceive how a ban on the receipt of honoraria for preaching on a Sunday could in any way jeopardize the performance of his official fire fighting duties nor how it could be in conflict with the policies of the agency he worked for. When the honoraria ban was discussed with this employee, he simply could not believe that the law had been enacted and his question was, "How long have I been violating the law for doing the Lord's work?"

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The broad prohibition against the receipt of any honoraria included in the Ethics Reform Act cannot be justified under any level of First Amendment scrutiny. The ban includes within its scope speech that is unrelated to official duties or the performance of official duties; it prohibits payment even when no conflict of interest or potential for ethical abuse exists; and it covers even the lowest level of employees of the federal government, the vast majority of whom do not hold positions where there is even a potential for influence.

The government simply does not have a substantial, much less a compelling, interest in subjecting all employees and most especially, rank-and-file employees, to a honoraria ban. And, the legislative history of the Ethics Reform Act provides a clear indication that the concern of Congress was not the potential for abuse by all government employees but rather by the Members themselves and certain senior Executive branch officials. Rank-and-file, career employees were not even discussed during the floor debates on the bill. In fact, we wonder whether the broad, sweeping language including all employees in the honoraria ban was just a drafting or inadvertent error and, hence, the fix need only be a technical correction.

The First Amendment of the Constitution of the United States provides that "Congress shall make no law...abridging the freedom of speech, or of the press..." Because First Amendment freedoms need breathing space to survive, the Congress may regulate in that area only with narrow specificity.

Further, freedom of speech may be as effectively abridged by indirect limitations as it is by a direct prohibition on engaging in protected activity. Title VI of the Ethics Reform Act restricts free speech by specifically subjecting a broad range of expressive activities that career federal employees conduct during their off-duty hours to significant and debilitating economic regulation. The Act targets only compensation for activities that the First Amendment protects, by making payment for writing and speaking unlawful, while leaving employees free to receive compensation for all manner of other outside employment activities. Thus, employees may sell gourmet cakes to the local bakery but may not accept a payment for an article about gourmet cooking from a home magazine or for a lecture about gourmet cooking from their local community association.

The Supreme Court has repeatedly recognized that economic regulations that target speech, like Title VI, the ban on the receipt of honoraria by all employees, directly interfere with the freedom of expression. As the Court has explained, a regulation that imposes restraints on financial support for speech "must be undertaken with due regard for the reality that [financial considerations are] characteristically intertwined with informative and perhaps persuasive speech...and for the reality that without [financial support] the support for such information and advocacy would likely cease." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).

The Court has found that various restrictions on the amount of money that charities can spend to solicit contributions impermissibly restricts the ability of the charity to speak. It has found that a prohibition on the use of paid petition circulators impermissibly restricts political expression because it limits the number of individuals who can convey a political message and, hence, the size of an audience, thereby making it less likely that a petition would garner sufficient signatures to be placed on the ballot.

Lower courts have followed this line of reasoning and it is now firmly established that the denial of payment for expressive activities through economic regulations constitutes a direct burden on those activities. Thus, for such restrictions to be constitutional, they are subject to exact scrutiny. The government has the clear burden of demonstrating that the restriction serves a compelling governmental interest and that it is narrowly drawn to achieve that end.

The prohibition on the receipt of honoraria by federal employees is obviously more than an incidental burden on speech. The prohibition removes the financial incentive to write articles or speak publicly. While employees are theoretically free to write or speak without compensation, as a practical matter the statute imposes severe, indeed in many cases, crippling conditions on that speech.

We are well aware of the Supreme Court's recognition that the government has certain interests as an employer in regulating the speech of its employees that differ significantly from those it

possesses in connection with the regulation of speech of the citizenry in general. However, where, as here, the fact of employment is only tangentially and insubstantially involved with the speech activity at issue, it is necessary to regard the employee as a member of the general public which he seeks to be. In enacting the honoraria ban, the Government simply fails in carrying its burden of justifying its interference with its employees' freedom of expression.

Furthermore, the honoraria ban fails to meet the test of being narrowly drawn to achieve the legitimate, articulated needs of the government. The government must be able to show that the employee's outside speech activities impede the performance of that employee's official duties or interferes with the regular operation, discipline, or the delivery of services to the public by the government. For obvious reasons, the more removed from top level management or from policy-making positions an employee is, the heavier the burden on the government to demonstrate interference with its operations. Here, the ban on honoraria burdens non-related speech by government employees at every level and in their private capacities.

Most importantly, the ban on the receipt of honoraria by all government employees is not necessary to protect the integrity of the government; is over broad and is too restrictive. In our opinion, Title VI of the Ethics Reform Act of 1989 is blatantly unconstitutional.

Some of the proposed legislative measures to correct the problems posed by Title VI remove the ban for employees below the GS-16 level. Although this would cover most of AFGE's members, we would suggest that the Committee consider whether the interests of the government are served by a restriction delineated by grade.

Some of the proposals would permit employees to receive honoraria but would continue the previous restriction of amounts not in excess of $2,000 for any one speech, appearance or article. Again, we question this line drawing. In our view, placing restrictions on amounts received for honoraria, especially amounts received for activities totally unrelated to an employee's duties or position, keeps in place meaningless, quantitative restrictions which bear no relationship to the legitimate and constitutional needs of the government.

It is for these reasons that we have come to the conclusion that federal employees' First Amendment rights of speaking, appearing and publishing can only be restricted when such activities impede the effective functioning of the government; when they impede the performance of employees' official duties or the delivery of services to the public, and/or when it can be shown that the First Amendment activities present an actual or apparent conflict with the performance of official duties.

Finally, because Title VI is in all likelihood, unconstitutional, an issue which, as you are aware, AFGE and others have raised in Court, we believe that any measure to amend it must have a retroactive

effective date to January 1, 1991. This would remove the threat of significant, up to $10,000, fines being imposed against employees who may have been in violation of Title VI since the first of this year as well as it would moot the present matters now pending before the United States Court of Appeals for the District of Columbia.

Mr. Chairman, I laud your timeliness in focusing on this issue as quickly as you could in this Congress and I urge you to report a measure which would only pose narrowly defined restrictions which are deemed absolutely necessary to preserve the integrity of the performance of the government's business and which will have a retroactive effective date of January 1, 1991.

Thank you for this opportunity to appear here today and if you or any members of the Committee have any questions, I will be happy to respond.

Mr. FRANK. Ms. Velazco.

STATEMENT OF SHEILA K. VELAZCO, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Ms. VELAZCO. I am not going to address anything in my statement at all. I would like to just address some of the questions that some of the gentlemen had earlier.

You wanted to know whether or not people did this for income. Yes, they do. They do it because they need the income sometimes. I was a GS–5 Social Security employee. I had a child who was still in diapers. I was putting my husband through college. I gave speeches on Peru and South America for money to get a diaper service. I didn't do it for any other reason. I did it for money.

Mr. FRANK. When did you sleep?

Ms. VELAZCO. I slept. I did not sleep on the job. It did not interfere with my job, and I did not use the job. So we do do it for money. I think it is taking away from us something that we need.

Also, with regard to the pre-January 1, 1991, laws that were in effect, and the agencies control over us, there was already control over us. If we were going to do outside work, we actually used the Ethics Office standards that they brought to the Senate yesterday. There's a five-part criteria there and we used that. If what we were doing interfered with how we were doing our work, whether it was because we were too tired to do it or whether it was because it was a conflict of interest, we already had that criteria.

With regard to the preapproval, I do not think you want preapproval on absolutely every single case. If you go preapproval, I would agree with somebody who said you're going to have to hire a lot of people. But give the employees the standards they must meet and let them decide if there is a conflict. We can take care of it later. But I don't want my boss having to worry about whether I should come to him to say I'm going to work 2 hours a week at a grocery store. So I think we need to use our heads in that. Preapproval can have some certain set standards on it. People can be aware of them.

The other thing, I think it needs to be retroactive to January 1, 1991, but we need to do it very quickly because people are losing money every single day we wait, and on top of that, they are losing the chance to be able to even go to those jobs later on because somebody else is going to be hired. Right now, if somebody wants an article written and a Government employee can't do it, I'm going to go search for somebody who can do it. So we're wasting their money if we don't do it right away.

Thank you.

Mr. FRANK. Thank you.

[The prepared statement of Ms. Velazco follows:]

PREPARED STATEMENT OF SHEILA K. VELAZCO, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman and distinguished Members of this Subcommittee, on behalf of the National Federation of Federal Employees, I appreciate the opportunity to present our views regarding the recently amended Ethics in Government Act and its prohibition on the receipt of honoraria by rank and file government employees. We strongly believe that this ban violates the First Amendment rights of rank and file Federal workers and should be repealed in light of this unconstitutionality. We support H.R. 325 as the appropriate vehicle to achieve this goal and we commend the Chairman for his efforts to redress this situation quickly and efficiently.

During work on the ethics bill in the 101st Congress, we supported legislative actions designed to limit judges', representatives and high ranking officials' dependence upon honoraria. However, we believe that the Ethics in Government Reform Act of 1989 is unintentionally overbroad in its application of the honoraria ban to all Federal employees.

The ban as it currently stands prohibits all Federal employees from accepting compensation for appearances, speeches or publications even if such activities bear no relation to their official duties or job status. We agree with the principle of limiting the use of honoraria as a means to influence the behavior of high ranking government

officials. Moreover, we agree with the general limitations imposed upon the acceptance of honoraria as outlined in the Ethics in Government Reform Act of 1989. However, we do not believe that an ethics problem exists among rank and file Federal workers to the extent necessary to justify the abolition of precious First Amendment freedoms. We know from our own experience that this prohibition has had a chilling effect on the First Amendment rights of rank and file Federal employees, many of whom are financially dependent upon this outside source of income as a supplement to their Federal salaries.

In recent weeks, we have received an outpouring of concern from our members that this provision directly deprives them of their right to self expression. The hardship this ban has inflicted upon rank and file Federal employees has been well publicized. I'd like to add to that an example of our experiences with this issue.

At the Picatinny Arsenal in Dover, New Jersey we represent an engineer who writes religious essays under a pen name. He writes essays - not books. While he is allowed to accept compensation for the publication of a book - a potentially much more substantive document - he is not allowed to accept compensation for writing a 2-3 page article. While he is allowed to accept compensation for working part-time, he is not allowed to accept compensation for writing articles in

his spare time. He does not understand how the writing of an article or essay by a rank and file Federal employee is less ethical than the writing of a book. Quite frankly, neither do we. It is our belief that, at this level of government employment, a ban on the acceptance of compensation for a speech, appearance or publication represents nothing more than a violation of the First Amendment right of free speech and self-expression. We fail to see how such prohibitions enhance the ethical performance of one's job when the protected activity in question is wholly unrelated to the employee's job, and the provider of the compensation would not be substantially affected by the employee's performance on the job.

We strongly support the corrective language in H.R. 325 which redefines the phrase "Member, officer, or employee" to include only Members, commissioned officers of the uniformed services and those high ranking government officials appointed by the President with the advice and consent of the Senate. We believe that this definition is more likely to produce the desired ethical effect than a blanket prohibition on all Federal employees. It is our belief that Congress never intended to breach the private associational activities of Federal workers when it banned honoraria for members of Congress. However, there is no doubt that left uncorrected, the provision will work real and irreparable harm to the Federal workforce. For that reason, we urge

that your corrective legislation be enacted immediately.

Mr. Chairman, again we thank you for the opportunity to submit our views on this important piece of legislation. We look forward to working with you and the subcommittee for its swift enactment. This concludes my prepared statement. I will be happy to answer any questions you may have.

Mr. FRANK. Ms. Bonosaro.

STATEMENT OF CAROL A. BONOSARO, PRESIDENT, SENIOR EXECUTIVES ASSOCIATION, ACCOMPANIED BY G. JERRY SHAW, GENERAL COUNSEL

Ms. BONOSARO. Mr. Chairman, I am going to speak to several issues which have arisen today, not the least of which concerns us is the suggestion that the career executive service ought to be included in the continuing prohibition.

To begin with, we, of course, have supported the bill, H.R. 325, because we felt there were sufficient safeguards existing already in the regulations in each Federal agency to deal with any conceivable abuse of honoraria for writing or speaking. Nearly all Government employees must clear any outside employment, as Mr. Tobias has noted, including writing and speaking, as a general matter with their agencies. Those few agencies which don't require that, we believe should.

But for that reason, we believe including any executive branch exemptions in a bill which this subcommittee might report out is fixing something which, at best, has not been shown to be broken. Many agencies take it upon themselves, furthermore, to put forward general proscriptions on certain kinds of outside employment. For example, the IRS precludes revenue agents routinely from selling insurance, or their attorneys from doing any outside legal work.

In preparing for this testimony, we were unable to identify one case, not one, in which a Federal career executive has been found guilty of a conflict of interest regarding the acceptance of honoraria for speaking or writing. So we would ask why do we persist in considering broadening restrictions without any evidence that a problem exists or that the system does not work.

Further, in response to the suggestion that the SES be included, we believe there is a clear case that career Federal executives are not in positions that lend themselves to honoraria abuse. Most members of the SES are general administrators, engineers, attorneys, and physical scientists. They are unable to influence legislation because of prohibitions on executive agency lobbying, and while some few are in policymaking positions, they generally are not in a position to grant favors to special interest groups.

Further, they file financial statements which are reviewed by their agency ethics officers, and which are open to public review in addition.

Clearly, banning honoraria for Federal executives is a case in which legislation was enacted without a need for it having been established.

We are also concerned, indeed, with the retroactive nature of the ban which exists. One of our members, for example, stands to lose approximately $48,000 in inventory of unsold books and return on investments, a small business which he engaged in, with full review and approval of his agency, without any diminution of his performance for his agency but with an eye toward preparing himself for retirement. He stands to lose that were this ban to continue.

Finally, I would like to point out to you that the Congress has just established a Senior Biomedical Research Service in order to improve recruiting top level medical researchers from the academic sector. We believe it is highly likely that recruitment from the academic sector will certainly be damaged were we to include senior executive service members and their equivalent in a continuing ban.

Likewise, physicians who serve part-time in the Department of Affairs work, in addition to veterans' hospitals, at their affiliated medical schools. As part of their responsibilities, they are regularly called on to lecture and publish on issues which do not relate directly to VA business. So, at a time when we need such physicians and biomedical researchers at the NIH and the VA, it seems senseless to suggest putting barriers in the path of their recruitment and retention.

Finally, we would make two suggestions to the committee. If you were to report out a bill which will include, for example, political appointees in a continuing ban, we would urge you to include a savings clause in the statute so that, should such singling out be found to be unconstitutional, the remainder of the statute would stand.

Further, the Federal Employees Pay Comparability Act eliminates the GS–16 through 18 pay rates. Therefore, instead of establishing a pay threshold in this bill, we believe that a better definition, should you choose to include a group that is basically GS–16 and above, is to refer to those whose positions are classified higher than the GS–15 level, rather than to do it on the basis of some sort of pay definition.

Thank you.

Mr. FRANK. Thank you.

[The prepared statement of Ms. Bonosaro follows:]

PREPARED STATEMENT OF CAROL A. BONOSARO, PRESIDENT, SENIOR EXECUTIVES ASSOCIATION

Mr. Chairmen, we thank you for both the opportunity to testify today, and your swift and timely introduction of HR.325, which will free federal employees from the burden of unnecessary and excessively restrictive ethics legislation. As you know, the Senior Executives Association represents the interests of career federal executives, including the Senior Executive Service and supergrade employees. Our members are among the highest-performing federal employees, and they provide the leadership and continuity which is vital to maintain the efficiency and effectiveness of federal agencies. In the interest of our members, as well as that of those they supervise, we are testifying today in support of H.R. 325.

We believe that the ban on honoraria for career federal executives in Section 501(b) of the Ethics in Government Act is unnecessary at best, as there are sufficient safeguards in the regulations of each federal agency to prevent executives from abusing honoraria for writing and speaking. Under current federal conflict-of-interest requirements, government employees must clear any outside employment with their agencies. Furthermore, many agencies take it upon themselves to put forward general proscriptions on certain kinds of outside employment. In the IRS, for example, revenue agents are prohibited from selling insurance, and attorneys are prohibited from doing outside legal work. Agency-level review and control

of outside employment has been effective. We have been unable to readily find any cases in which a federal career executive has been found guilty of a conflict-of-interest involving the acceptance of honoraria for speaking or writing.

Furthermore, career federal executives are not in positions that lend themselves to honoraria abuse. A breakdown of Senior Executive Service (SES) positions shows that most members of the SES are general administrators, administrative specialists, engineers, attorneys, and physical scientists. They are unable to influence legislation because of prohibitions on executive agency lobbying; and, while some are in policy-making positions, they generally are not in a position to grant favors to special-interest groups. Clearly, the ban on honoraria for federal executives is a case in which legislation was enacted without a need for it having been established.

SEA is also concerned regarding the inflexibility of the ban on honoraria. Some federal employees entered into speaking or writing arrangements years ago, with the full acquiescence of agency ethics officials. With the sudden onset of the Pay and Ethics Reform Act, these individuals may be forced to take financial losses in order to divest themselves of these arrangements.

One of SEA's members, for example, began a publishing business with the full consent of both his supervisor and his agency's office of general counsel. The business did not

interfere with his work, and he received several consecutive "outstanding" performance ratings. As a result of the Pay and Ethics Reform Act, however, he may be required to close down this business, at a personal cost of $48,000 in unsold books, return on investments, indirect costs, and profits. Furthermore, he may be unable to continue publishing even after retirement, as his reputation as a reliable publisher will have been destroyed. Another SEA member is an agency official who is compensated for magazine articles she writes based on her genealogy research. Although this activity has no bearing on or relationship to her official duties, these activities could be considered illegal under the Pay and Ethics Reform Act.

The inflexible nature and the lack of justification of the ban on honoraria, as illustrated by these two examples, damage the morale of career federal executives. One SEA member writes that if he is required to abandon his hobbies, which provide outside income, he will "probably continue with the government, albeit with considerable pain and bitterness." The ban will also serve, however, as a serious block to recruitment from the private sector into the federal government.

The recruitment and retention of highly-specialized professionals, who are required to publish and lecture periodically in order to maintain their professional standing, would become unnecessarily more difficult. A Senior Biomedical Research Service has recently been established to recruit

top-level medical reaesrchers from the scedemic sector; it is likely that recruitment for the SBRS will be dsmsged unless the proecription on receiving honoreria is lifted.

Similarly, the honoraria ben hae a direct effect on Title 38 physiciens in the Veterans Administration. Nearly fifty percent of all VA physiciana are part-time (7,000), snd they work at Veterens Hoepitale, ae well ss at their affiliated medical echoola. Theee psrt-time phyeicians, with their medical school responsibilitiea, ere regulerly called upon to lecture and publish on issuee which do not relste directly to VA business. In fact, the partnership with medical schoola has helped the VA prepere to meet its Depertment of Defense support responsibilitiea. Most pert-time VA physicians will be forced to leave VA employment and work full-time at their medicel schools if the proscription on receiving honoraria ia not eliminated.

Msny full-tima VA physiciana alao raceive eupplementsl income for lecturing. In a time when we need VA physicisns more than ever, we ahould not put barriers in their path which mey encoursge them to turn sway from public service in order to pursue more lucrstive careere in the privste sector.

According to lswsuits filed by NTEU, AFGE, and the ACLU sgeinst the Office of Government Ethice, the honorsria ban is not only unnecessary and exceeeively rigid, it slao infringes on federel employeea' right to free epeech. Some federal employeee

do not heve the resources to carry out speaking or writing activities without receiving compensation, so the prohibition on honoraria effectively hars them from speaking or writing.

SEA supports HR.325, although we recommend that this hill be amended to remove section 2(B)(ii). At present, an executive order prohibits all political appointees from receiving outside income of any kind. Since the inclusion in this bill of a legislative hsn thst singles out politicsl appointees could provide additional grounds for a finding that the prohibition is unconstitutional, we strongly urge thet a ssvings clause he inserted in the statute if the Subcommittee chooses to retain section 2(B)(ii).

We note thst the Federal Employees Pay Comparshility Act eliminates the GS-16 through 18 pay rates, instead estahlishing s pay band beginning at 120% of the minimum rate of hasic pay for GS-15. If the han is to continue, we urge thet this base not become the new threshold for its incluaion. If it were, it would unnecessarily include many non-career GS-15's not now covered. Under thet new formule, all non-career GS-15's in steps 7, 8, 9, and 10 would he included, ss well ss those in PMRS whose pay exceeded GS-15 step 6. The threshold should remain for those non-cereer employees occupying positions classified higher than GS-15.

Thank you for the opportunity to testify before the Subcommittee. We would he pleased to answer any questions regarding our testimony.

Mr. FRANK. I thank all of you for your very good testimony. Your members should know that all of you have done a very good job of representing their legitimate interests in calling this to our attention and pressing us to move and contributing to the process.

I was not aware of the extent to which we have prior approval in various departments. One of the things that bothered me about prior approval is overburdening OGE. What if we were to mandate in statute a requirement that each agency set up its own prior approval mechanism and that such a plan be submitted for approval to OGE? That is, if you have no problem with prior approval, there might be one or two who don't have it. Would there be any problem with our moving to make sure, statutorily, that each Department had an appropriate prior approval mechanism?

Ms. VELAZCO. Earlier Mr. Potts stated that they were looking at making it a Governmentwide standard. I think that's actually better.

Mr. FRANK. But could it be administered by the agency?

Ms. VELAZCO. Definitely.

Mr. FRANK. The standard would be Governmentwide. Again, we would run into the problem of OGE being somewhat overburdened.

Mr. TOBIAS. There would be no objection. We already do it that way.

Mr. FRANK. So you wouldn't have any problem with taking that prior approval principle and in some way making sure that everybody had it?

Mr. TOBIAS. None.

Mr. SHAW. I think the prior approval, Mr. Chairman, should be by subject matter, not necessarily article by article, because there are——

Mr. FRANK. I understand. But what I'm talking about is having a mechanism for prior approval. It could be by category of work.

I am convinced, as I said earlier, in asking my staff to draft this, that we put too much emphasis on subject matter in terms of conflict of interest. I agree that the payor is very largely the determiner of whether or not there's a conflict of interest. If, in fact, someone was trying to be a corrupter, fine, so you don't care about the subject matter. In fact, the less the person knows about what he or she is talking about, the more grateful he or she will be for getting paid to discuss it. As expertise diminishes, the corruption content presumably goes up.

Let me ask you, Ms. Bonosaro, the person who is going to maybe lose $48,000, that's obviously not in 1 year—because of the 15-percent restriction. Unless, is this a person making like $300,000 a year?

Ms. BONOSARO. It's a matter of unsold inventory that has been published, indirect costs for equipment, lost return on investment, and——

Mr. FRANK. Well, retroactivity, he isn't going to lose $48,000 in a month.

Ms. BONOSARO. Well, obviously he wants to—as of right now, he at least is certainly, theoretically, if not legally, out of business——

Mr. FRANK. Please don't overargue your case. My guess is it wouldn't be hard to rebut the $48,000 figure. I mean, $48,000 is, after all, an unusual amount, with the 15-percent rule. We don't

want people to think, in terms of the general public, that we're talking about sums of that large amount.

Ms. BONOSARO. Not at all. It's a matter of his doing this over a number of years and that's as far as he has come now.

Mr. FRANK. Tell him we will respect his legitimate interests, but he shouldn't be offended if we don't talk about it that much. You always run into a danger where an exceptional case will be misrepresented as the norm. That's not what we want the people to understand.

I look forward to working with you. We understand the need for speed. This was as quickly as we could schedule the hearing. We had it scheduled for Tuesday and we were preempted by the full committee. We didn't want to go yesterday because the Senate committee was going and we figured some of you would be there. So this was the earliest date we could do it.

As I have already said—and I will check with the ranking minority member—but my intention would be to have a markup probably the week after we come back, the last week in February. That would be my intention in terms of a markup. So I invite any of you who are interested—two things.

First, Ms. Bonosaro, you made the point that we have no cases of a prosecution. Now, I think that's valid as an item of evidence, but somebody might say well, that's because the law wasn't strict enough so no prosecution would have been possible.

I want to repeat my invitation to any of the organizations, Common Cause or any individuals, if anyone has any examples of abuses, to submit them. I suppose what would be more relevant would be unprosecuted abuses, abuses that should have been but weren't because the law wasn't there. I don't think we're going to find very many. But I do want to make it clear that we are asking people to do that, and in the absence of such a submission, I think we'll be entitled to infer there was not a whole lot of abuse.

So I would ask you also to keep thinking about prior approval questions, how do you define conflict of interest, appropriate levels, and we will be ready to receive suggestions and information. You can save us the time and trouble, if you have anything to suggest, don't just send it to one of us; send it to every member of the subcommittee. It just eases our staff of the duplication. Please feel free to do that.

Mr. Gekas.

Mr. GEKAS. I have nothing. I simply repeat that I am very much interested in implementing prior approval in some fashion. It may be that we'll devolve to the submitting of a plan, as Barney has indicated, but prior approval seems to me to be a fail-safe.

Mr. FRANK. Not only that, but say to the people there's a tradeoff. If we can work out an efficient prior approval mechanism, I think what that does is to give people more confidence. You need fewer blanket restrictions. Prior approval becomes a substitute for that. If we can work that out, I think that might well be in everybody's interest.

Mr. Schiff.

Mr. SCHIFF. Nothing further, Mr. Chairman. Thank you.

Mr. FRANK. There being no further comments, and all statements for the record have been submitted, the hearing is adjourned.

[Whereupon, at 12 noon, the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—TOLAND, PETER, PRESIDENT, NATIONAL COUNCIL SOCIAL SECURITY MANAGEMENT ASSOCIATIONS, INC.: PREPARED STATEMENT

ETHICS REFORM ACT OF 1989:
PROHIBITION ON HONORARIA

The National Council of Social Security Management Associations, representing over 3500 managers and supervisors in SSA field offices across the country, supports H.R. 325. We very much appreciate the leadership taken by Chairman Frank and his colleagues who have introduced similar legislation to narrow the impact of the overly-broad honoraria prohibition contained in the Ethics Reform Act of 1989. We do not believe there is any justification for subjecting career federal employees to an absolute ban on acceptance of honoraria. We understand that this legislation will restore to career federal employees the ability to follow procedures established by their agencies, as was the case prior to January 1, 1991, in accepting payment for writing and speaking.

In order to protect the government's interests, federal agencies have long had discretion to regulate outside employment activities of federal employees, including the discretion to restrict their ability to write and speak for pay. Many agencies require their employees to obtain agency approval for all employment outside the agency. Each agency is best able to determine whether a proposed outside activity conflicts either with the individual's work responsibilities or with other interests of the government.

This "going through channels" eystem hae worked well. Generally, federal employees have been able to accept payment for writing and speaking on subjects not directly related to and not in conflict with their federal position or status. Many employeee, euch as scientists and reeearchere, have frequently been permitted -- in many cases encouraged -- to write and speak both with and without payment on subjects which are related to their government work when such outside activities further the intereste of the government.

We etrongly support a return to agency discretion regarding the outside activitiee of career employees, with the attendant return to the five-part "relatedness" test recommended by the Office of Government Ethics: the honorarium may not be paid (1) for carrying out government duties; (2) because of official poeition; (3) because of government information that is imparted; or (4) by someone doing government busineee with the recipient; and (5) no government resources may be used to produce the articlee or speeches. We underetand that OGE doee not plan any more rigid test of relatedness under this legislation than had long been in effect prior to January 1, 1991.

Unfortunately on that date many career federal employees who have complied with existing etandards of conduct and obtained agency approval for their activities in the paet find themselves in violation of the law if they continue to accept payment for

making speechee and writing articlee on their own time on any subject whatsoever. This inequity wae created becauee the Ethice Reform Act restriction, intended primarily for Msmbsre of Congrese and political appointees in the Executive Branch, wae written in overly-broad languags, sweeping in all employees of the federal government.

By prohibiting all federal employees from accepting honoraria, defined as money or anything of value, for giving spseches and writing articles even on subjecte unrelated to and not in conflict with their federal jobe, Section 601 of the Ethics Reform Act of 1989 creates an impossible situation for many federal employess pureuing outeide intereete for pay.

The Office of Government Ethice worked painetakingly to prepare regulatione to implement the eweeping meaeure passed by Congress under the Ethics Reform Act. We appreciate the fact that the exteneive guidelinee OGE released in November of 1990 were written in a epirit of generoeity toward federal smployeee caught unaware by the eudden policy shift repreeented by the honoraria ban. While OGE was able definitionally to reetrict somewhat the applicability of the ban, for example by exempting eome teaching activities and fiction writing, they could not circumvent all inequitiee created unwittingly by Congreee when it paeeed the Ethice bill.

Despite development of OGE's guidelinee, some employeee will have difficulty understanding which activitiee are subject to the ban and whether payment constitutes "honoraria" or "outeide income," which is covered by different reetrictione. Other employeee, who may write newepaper columns and magazine articlee or epeak at community and civic groupe about their hobbiee, travele or sporte intereete, will more clearly be barred from accepting payment for these activities under the law ae it is now written.

Following are examples of employee eituatione brought to our attention when we alerted our members about the ban last year:

* An employee in California who wrote a eeriee of articlee on epirituality and AIDS for religious publications and received payment for eeveral of them.

* An employee in Penneylvania, the pastor of a small church, whose activities in that capacity include teaching, conducting funerale and weddinge, and writing religious articlee.

* An employee in California who teachee emall groupe and givee preeentations about tapestry and baeket weaving.

* An employee in Virginia who does local baekstball broadcasts, speaks at sports banquets for a fee and hae writtsn baeketball commentary for national newspapsre.

* An employee in Virginia who contributee his writing talsnte to his wife'e publishing bueinese, concentrating on non-fiction books about antiquss, in prsparation for establishing their own retirement businese.

None of theee activities depends on or conflicte in any way with the work or poeition of the Social Security Adminietration employee undertaking them, yst theee individuals -- and in some caees their families who depend on the additional income -- are unfairly penalized under the honoria ban.

Ironically, ae reeponsible employeee of the Social Security Adminietration, we frequently counsel future beneficiariee concerning the need to take personal reeponeibility for a portion of their financial neede in retirement. We advise them to save for retirement and to plan alternative eourcse of ongoing, supplementary retirement income based on their intsrests and skills. The foundation of such income-producing activitiss moet often must be laid prior to retirement, in precisely the way the employees described above have done. Yet we who counsel others to plan for income in retirement are currently banned from laying the eame foundation of retirement security for ourselvee.

The blanket honoraria prohibition ignores the difference between political appointees, who often accept honoraria to speak and write to further specific political objectives, and career federal employees, who are doing their job for the government and pursuing on their own time personal interests which are unrelated to their experience or status as federal employees. Our Association believes that this distinction is a critical one.

In fairness to career federal employees, Congress must amend the Ethics Reform Act to remove for career federal employees the inequitable ban which went into effect January 1, but should maintain the prohibition against honoraria for the political appointees and Members of Congress for whom the ban is appropriate. We urge swift enactment of corrective legislation.

Thank you for considering our views.

APPENDIX 2.—NATIONAL TREASURY EMPLOYEES UNION, ET AL., PLAINTIFFS-APPELLANTS V. UNITED STATES OF AMERICA, ET AL., DEFENDANTS-APPELLEES, BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLEES, IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, JANUARY 15, 1991

ORAL ARGUMENT SCHEDULED FOR JANUARY 29, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-5406, 90-5407, 90-5413

NATIONAL TREASURY EMPLOYEES UNION, et al.

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR COMMON CAUSE
AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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January 15, 1991

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties, intervenore, and amici appearing below and in thie Court are listed in the Brief for Appellants.

Common Cause is a nonprofit, nonpartisan organization with approximately 280,000 members. Common Cause has participated actively in litigation relating to government ethics and campaign finance legislation.

B. Rulings Under Review

References to the rulinge below appear in the Brief for Appellants.

C. Related Cases

The cases on review have not previouely been before thie Court. Counsel are aware of no other related casee currently pending in thie Court or any other court, ae defined in Rule 11(a)(1)(C) of the General Rulee of thie Court.

RULE 11(E)(5) CERTIFICATE OF COUNSEL

The following statement is submitted by counsel pursuant to Rule 11(e)(5) of the General Rules of this Court:

In its order dated December 20, 1990 (A.11), this Court granted Common Cause's motion to participate as amicus curiae and authorized the filing of a separate brief with a separate filing deadline.

The separate brief by Common Cause will assist the Court in its consideration of this case. Common Cause played a significant role in connection with enactment of the prohibition on honoraria at issue in this case. Representatives of Common Cause testified on the practice of honoraria before presidential commissions and congressional committees, and the organization worked actively to promote the passage of the legislation. Common Cause's familiarity with the legislative background of the Ethics Reform Act of 1989 and its longstanding interest in the federal ethics laws are reflected in the brief's discussion of how the challenged limitation serves vital government interests. The brief also brings Common Cause's expertise to bear on the other issues presented.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-5406, 90-5407, 90-5413

NATIONAL TREASURY EMPLOYEES UNION, et al.

v.

UNITED STATES OF AMERICA, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether the district court abused its discretion in denying plaintiffs' motions for preliminary injunctive relief against enforcement of the statutory ban on government employees' receipt of honoraria for appearances, speeches, or articles, when (a) the ban is an important prophylactic measure against corruption and the appearance of impropriety in government, (b) the statute does not prohibit any expressive activity, and (c) the district court correctly found that no plaintiff had shown irreparable injury?

RELEVANT STATUTORY PROVISIONS

All applicable statutes are contained in an addendum to appellants' brief.

STATEMENT OF FACTS

Title VI of the Ethics Reform Act of 1989 ("the Act") prohibits the receipt of honoraria for any appearance, speech or article by any Member, officer, or employee of the United States government, except for Senators and Senate employees. Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989). The Act does not prohibit appearances or speeches or the publication of articles. It provides only that an employee may not receive payment for such activities, with the exception of reimbursement for travel expenses. Id. 103 Stat. 1761.

The application of the Act to middle and lower-level government employees was not, as plaintiffs allege, a purposeless and inadvertent addition to the nation's laws. Rather, it was part of the step-by-step effort by Congress, over a period of many years, to protect against corruption and to ensure the appearance of impartiality in the federal government. Congress has long recognized the risk that federal employees at all levels -- not only those above a certain rank or salary level -- can harm the public interest if they are subject to improper financial influence. Since the 19th century, conflict-of-interest statutes have prohibited government employees from acting for the government in business transactions in which they have a financial interest.[1] As the Supreme Court recognized,

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[1] See generally S. Rep. No. 2213, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Admin. News 3852, 3853-54.

> The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service . . . .[1]

Similarly, all executive branch officers and employees have long been subject to the prohibitions against bribery, graft, representation of private parties in matters affecting the government, and private compensation for government services.[2]

In 1974, in the wake of the Watergate era scandals, Congress enacted statutory restrictions on honoraria for every "elected or appointed officer or employee of any branch of the Federal Government." The amount of any honorarium for an appearance, speech or article was limited to $1,000 (excluding reimbursement for actual travel and subsistence expenses), with an aggregate limit of $15,000 in any calendar year. Pub. L. No. 93-443, § 101(f)(1), 88 Stat. 1268 (1974). Two years later, the limits were raised to $2,000 per speech and $25,000 per year, and civil rather than criminal penalties were provided, but the restrictions continued to apply to government employees at all

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[1] United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961) (emphasis added) (construing 18 U.S.C. § 434, a predecessor of 18 U.S.C. § 208 (1988), which applied to any "officer or agent of the United States").

[2] See S. Rep. No. 2213, supra note 1, reprinted in 1962 U.S. Code Cong. & Admin. News. at 3856-58 (discussing 18 U.S.C. §§ 201, 203, 205, 209 and their predecessor statutes).

levels in all three branches. Pub. L. No. 94-283, § 112(2), 90 Stat. 494 (1976) (codified at 2 U.S.C. § 441i).

The evils caused by honoraria were explained in reports of special ethics panels in the House and Senate in 1977, which recommended the adoption of tighter restrictions on the receipt of honoraria by members. Both panels recognized that polls and public surveys showed rising public cynicism over the practice of honoraria, and noted the inherent potential for conflicts of interest. The House adopted a $750 limit on honoraria for any single speech, an annual limit on outside earned income, and stringent regulations concerning travel expenses; the Senate adopted similar restrictions.[4]

The executive branch also adopted regulations limiting the receipt of honoraria by its employees. Executive branch personnel may not receive honoraria for speeches or articles that focus specifically on the employing agency's policies, create a conflict of interest or the appearance of a conflict of interest, or interfere with the employee's official duties. See 5 C.F.R. § 735 et seq. (1990). These and other regulations proved insufficient to curtail the abuses created by outside earned income and to promote public confidence in the integrity of

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[4] Financial Ethics: Communication from the Chairman, House Comm'n on Admin. Review, H.R. Doc. No. 73, 95th Cong., 1st Sess. 9-12 (1977); Senate Code of Official Conduct: Report of the Senate Special Comm. on Official Conduct, S. Rep. No. 49, 95th Cong., 1st Sess. 8-9, 37-39 (1977). The Senate rule was never implemented, leaving the Senate covered by statutory limits. The House rule was later revised.

government.[3] In 1989, President Bush provided a partial remedy by prohibiting all presidential appointees in the executive branch from receiving any outside earned income (including any honoraria). See Exec. Order No. 12674 (1989), 3 C.F.R. § 215 (1990).

In the legislative branch, the limits on honoraria also proved insufficient to prevent scandal and preserve public confidence in government. Although honoraria received by members of the House and Senate created the most visible ethical problem, sizeable honoraria for Congressional staff members also fueled public cynicism about the integrity of government. The press gave widespread coverage to honoraria received by staffers -- including $28,000 pocketed during a two-day speaking trip to Oklahoma and Texas by the top staff aides to House speaker Jim Wright and minority leader Robert Michel.[4]

Newspaper articles and editorials across the country reflected the public view of honoraria as "legalized bribery," "legislative prostitution," "shameless pandering to special-interest payoffs," "bag money," "lobbyist payola," "appalling,"

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[3] See Stengel, Morality Among the Supply-Siders, Time, May 25, 1987, at 18 (listing ethical lapses by Administration officials, including improper payments from private parties).

[4] Babcock, For Two in the House, A Fast $28,000 in Fees, Washington Post, Oct. 6, 1989; see also Yang, Honoraria, Bounty of Special Interest Groups, Trickle Down to Some Congressional Staffers, Wall St. J., May 26, 1989; Babcock, Interest-Group Honoraria Plentiful for Top Hill Aides, Washington Post, Oct. 6, 1989; Matlack, Gravy Train, National Journal, Jan. 28, 1989; Vukelich, Honorarium Ban Would Hit Hill Staff, Officers in Wallet, Washington Times, Feb. 7, 1989; Mattingly, Staff Plays Honoraria Game Too, Roll Call, Jan. 22, 1989, at 1, col. 4.

a "disgrace" and a "low-life practice."[3] Against this background, Congress undertook the task of overhauling the government ethics rules; this process led to the 1989 Act.

To assist in this effort, the President and Congress appointed several blue-ribbon panels to investigate and propose remedies for the deficiencies in existing law. After taking extensive testimony, each of these panels specifically recommended a ban on the receipt of honoraria by all government personnel. The Quadrennial Salary Commission concluded that the "potential for impropriety in the present rules governing honoraria was so high that the practice of receiving honoraria should be eliminated." It "strongly recommend[ed] that the practice of accepting honoraria in all three branches be terminated by statute . . ."[4] The President's Ethics Commission similarly urged that Congress should "ban the receipt of honoraria by all officials and employees in all three branches of government."[5] Finally, the 14 members of the House Bipartisan Task Force on Ethics asserted that "honoraria

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[3] Hearings on Executive, Legislative, and Judicial Salaries before the Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. 30, 32 (1989) (hereinafter Senate Hearings) (statement of Fred Wertheimer, President of Common Cause).

[4] Fairness For Our Public Servants: Report of the 1989 Commission on Executive, Legislative and Judicial Salaries at 24 (emphasis added).

[5] To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform (hereinafter Ethics Commission Report) 35-36 (March 1989) (emphasis added) (A. 146-47).

[should] be abolished for all officers and employees of the government."[10]

These recommendations served as the basis for Congress' decision to extend the honoraria ban throughout the executive branch.[11] Upon signing the 1989 Act, President Bush declared that the statute "contains important reforms that strengthen Federal ethical standards" and described the honoraria ban for federal employees as one of the "[k]ey reforms in the Act."[12]

Thus, the 1989 legislation banning honoraria for government employees at all levels reflects two long-standing themes in the history of federal ethics regulation: (a) the need to protect against corruption and the appearance of impropriety on the part of government employees at all levels, and (b) the abuses presented by the payment of honoraria for

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[10] Report of the House Bipartisan Task Force on Ethics on H.R. 3660, 101st Cong., 1st Sess. 14 (1989) (emphasis added); see Senate Hearings, supra note 7, at 10 (statement of Lloyd Cutler, Chairman of the Quadrennial Commission). Mr. Cutler is also one of the authors of this brief.

[11] See Statement of President George Bush upon signing H.R. 3660, 25 Weekly Comp. Pres. Doc. 1855 (1989) (the Act "is based on . . . the recommendations of the President's Commission on Federal Ethics Law Reform, and the report of the House Bipartisan Ethics Task Force"); 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (remarks of Rep. Lynn Martin, co-chair of House Bipartisan Task Force) ("a good part of [the bill] is based on the recommendations of the President's ethics commission.")

In 1989, the Senate chose to exempt itself from the honoraria prohibition. Subsequently, the Senate voted, 77-23, to bring the Senate into line with the rest of the federal government by extending the honoraria ban to all Senators and Senate employees, 136 Cong. Rec. S11476 (daily ed. Aug. 1, 1990), but the bill died in conference.

[12] Statement of President George Bush, supra note 11.

appearances, speeches and articles. The honoraria ban at issue in this case was a logical result of the federal government's evolving efforts to protect the integrity of government and to restore public faith in government institutions.

SUMMARY OF ARGUMENT

The District Court correctly ruled that plaintiffs are not entitled to preliminary injunctive relief. First, they are unlikely to prevail on the merits because the statutory ban on honoraria for all executive branch personnel is fully consistent with the Constitution. It serves compelling governmental interests -- protecting the integrity and impartiality of the government service, and avoiding the appearance of impropriety that undermines public confidence in government.

Congress reasonably concluded that the honoraria ban, like previously-enacted ethics restrictions, should apply to employees at all levels. Honoraria are potential vehicles for corruption; many government employees below GS-16 exercise substantial discretionary authority and could be subject to improper influence. Contrary to plaintiffs' assertions, Congress also had reasonable basis for concluding that the existing executive branch regulations are subjective and do not sufficiently protect the vital government interests at stake.

Congress has extensive authority to regulate the terms and conditions of government employment -- including expressive activity by civil servants -- for reasons related to the functioning of government. In this area, this Court should

apply a balancing test, under which an important government interest is sufficient to justify restrictions on speech. The authority of Congress to regulate the federal workforce is best illustrated in the Hatch Act cases, which upheld a statute proscribing a broad range of expressive activity in order to serve essentially the same interests as the honoraria ban.

A balancing test is particularly appropriate here because the ban on honoraria does not prohibit any speech -- only personal financial gain. Federal employees may continue to make appearances and speeches and to publish articles; they may accept full reimbursement for necessary travel expenses; all that they cannot do is to accept compensation. Although the statute may create an indirect burden on speech, any resulting diminution of speech is self-imposed.

This Court should also reject plaintiffs' contentions that the statute is overbroad and underinclusive. The honoraria ban is directed to a practice that has given rise to abuses in the past and that presents a risk of impropriety at all levels of government service. At bottom, plaintiffs' contentions rest on policy disagreements with Congress in an area where the Constitution gives Congress substantial latitude.

Plaintiffs have failed to show any irreparable injury. The temporary loss of income alone does not constitute irreparable harm. Indeed, many of plaintiffs' claims of harm rest on untested, and questionable, assumptions about the applicability of the statute. Although plaintiffs contend that they are

entitled to interim relief to prevent a temporary violation of their First Amendment rights, this claim is vitiated by the weakness of their case on the merits as well as their continuing ability to speak and write without substantive restriction.

Finally, the balance of hardships and the public interest weigh heavily against preliminary relief. If this Court were to enjoin the honoraria ban, there would be no statutory ceiling on the size of honoraria that could be accepted by any executive, legislative or judicial official presently covered by the ban, and no binding regulations outside the executive branch. The public interest in fair, impartial, and trustworthy government requires that the honoraria ban remain in effect.

ARGUMENT

The District Court properly denied preliminary injunctive relief in this case, because plaintiffs have failed to make the requisite showing. They are unlikely to succeed on the merits; they have failed to show irreparable injury; a preliminary injunction would significantly harm the public interest; accordingly, the overall balance of hardships favors the denial of injunctive relief.

I. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS, BECAUSE CONGRESS' DECISION TO BAN HONORARIA FOR ALL EXECUTIVE BRANCH PERSONNEL COMPORTS WITH THE CONSTITUTION.

Plaintiffs do not quarrel with a flat honoraria ban for senior government officials, Members of Congress, or judges. Nor do they contend that Congress may not prohibit honoraria for

all federal employees for appearances, speeches and articles relating to their official duties. Brief for Appellants at 35-36. They challenge only the policy decision of Congress to prohibit honoraria for federal employees below the GS-16 level.

This challenge must fail, because (1) the prohibition serves fundamental interests in protecting the integrity of government service and preventing the appearance of impropriety; (2) Congress may constitutionally exercise extensive authority over expression by government employees that affects important governmental interests; and (3) the challenged statute does not prohibit any speech by government employees, but only precludes financial reward in compensation for speech. The decision to adopt an across-the-board prohibition on honoraria reflects policy judgments of Congress that should not be disturbed.

A. The Honoraria Ban Serves Fundamental Interests -- the Integrity of Government and Public Confidence in Government Institutions

The crux of plaintiffs' argument is their assertion that the ban on honoraria serves no discernible government interests. That claim cannot stand. The compelling rationales for a flat prohibition on the receipt of honoraria are plainly set forth in the legislative history.

The Supreme Court has repeatedly recognized the fundamental importance of integrity and impartiality in government. See, e.g., Federal Election Comm'n v. National Right to Work Comm. (NRWC), 459 U.S. 197, 210 (1982); Buckley v. Valeo, 424 U.S. 1, 26-29 (1976); United States Civil Service Comm'n v. National Ass'n

of Letter Carriers (CSC), 413 U.S. 548, 565 (1973) ("this great end of Government -- the impartial execution of the laws").

In supporting the honoraria ban, the ethics panels and members of Congress expressed deep concern with corruption and the growing influence of special interests. As the Ethics Commission warned, the payment of honoraria "to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor." Ethics Commission Report at 35. One legislator observed that the practice of honoraria institutionalizes "a thinly veiled system of legalized influence buying."[12] Honoraria, unlike campaign contributions, go directly into the pockets of the recipients for personal use. Congress could remove the threat of impropriety only by insuring that public officials serve only "one paymaster" -- the government.[13]

Second, apart from actual corruption, the Supreme Court has emphasized the vital government interest in avoiding the appearance of impropriety. "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to

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[12] 135 Cong. Rec. H8766 (daily ed. Nov. 16, 1989) (statement of Rep. Wolpe). See also 135 Cong. Rec. H8758 (daily ed. Nov. 16, 1989) (statement of Rep. McCollum); 135 Cong. Rec. S15952 (daily ed. Nov. 17, 1989) (statement of Sen. Humphrey) (the practice of honoraria was a "scandal waiting to happen").

[13] See 135 Cong. Rec. H8752 (daily ed. Nov. 16, 1989) (statement of Rep. Solomon); id. at H8767 (statement of Rep. Brennan) (discussing Congressional pay structure); Congressional Ethics Reform: Hearings Before the House Bipartisan Task Force on Ethics (hereinafter Task Force Hearings), 101st Cong., 1st Sess. 89 (1989) (statement of Lloyd Cutler).

the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." CSC, 413 U.S. at 565; see Buckley, 424 U.S. at 26-27.

A shared concern over the appearance of impropriety in the federal government pervades the legislative effort that culminated in the 1989 Act. Congress was painfully aware of the growth of public cynicism about the integrity and ethical standards of Congress and the executive branch -- cynicism fostered by the widespread practice of honoraria. Malcolm Wilkey, the Chairman of the Ethics Commission, and Griffin Bell, its Vice-chair, both described the system of honoraria as "evil." Mr. Bell observed, "People wonder who's paying all the honoraria. It undermines confidence in government."[15] The public realized that special interest groups were paying honoraria to obtain preferential access to government officials.[16] In floor debate, legislators repeatedly stated that receiving honoraria "creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials."[17] Accordingly, a flat ban on honoraria was necessary to restore citizens' confidence in government.

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[15] Pincus, Ethics Panel Tentatively Backs Honoraria Ban in Top Jobs, Washington Post, Feb. 23, 1989, at A1.

[16] See Task Force Hearings, supra note 14, at 39 (statement of former Rep. Charles Whalen).

[17] Report of the House Bipartisan Task Force on Ethics, supra note 10, at 12; see 135 Cong. Rec. H8766 (daily ed. Nov. 16, 1989) (statement of Rep. Wolpe).

1. The Legislative History Demonstrates the Need To Apply the Honoraria Ban to Employees at All Levels of Government Service

Plaintiffe cannot and do not deny that Congress has a powerful interest in preventing corruption and the appearance of corruption in government service, or that honoraria have given rise to abuse and public criticism in recent years. Rather, they argue that prohibiting honoraria for employees below GS-16 -- clearly spelled out in the words of the Act[11] -- was somehow the result of inadvertence or inattentivenees on the part of Congress and serves no legitimate purpoee. This claim is belied by the background and legislative history of the Act.

Prior to the effective date of the Act, all federal employees were subject to a $2,000 ceiling on honoraria. Thus, Congress had already accepted the basic premiee that honoraria paid to employees at all levels are potential vehiclee of abuse. Each of the panels appointed by the President and Congreee in 1989 to inveetigate reform of the ethice and compensation lawe explicitly recommended that the ban on honoraria extend to all government employeee.[12] The 1989 amendment changed the $2,000

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[11] When Congreee intended certain other provisione in the 1989 Act, such as the percentage limitations on outside earned income, to apply only to eenior employees, it made its intentions clear. See, e.g., Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (§ 501(a) of Ethics in Government Act).

[12] See supra at 6-7. Plaintiffs note that other categories of government officials subjected to the honoraria ban also received a ealary increase under the 1989 Act. Government employees, however, have no constitutional right to continue receiving payments that are fraught with the potential for abuse, as long as their salaries are not increased to make up for the lost compeneation.

ceiling to a complete ban, while preeerving the existing coverage of the honoraria restrictione.

To be sure, moet members of Congrees discuesed the need to prohibit honoraria with reference to themselves and their colleagues. But honoraria paid to officials and employees in the executive branch present similar risks of abuse and the appearance of impropriety, and Congress was well aware of the risk that lower-level employees could be corrupted by receiving favors from special intereets. During the debate on the 1989 ethics legislation, in a discussion of ethics problems in government procurement, for example, Senator Grassley stated:

> The same Government individuals who were drafting the Government specifications for a major computer acquisition were hosted by [a computer manufacturer] at the company's California resort, with golfing at Pebble Beach and gambling at Lake Tahoe, all with [the company's] sales people. This activity has become a way of life. It is kind of a cultural phenomenon within thie closely knit society of the military-industrial complex, maybe to some extent in the entire Government contracting community.[20]

Within the legislative branch, congreseional staffers were receiving honoraria, in some cases on the same scale ae to Members themselves. See supra at 5. To eerve compelling government intereets, Congress adopted a broad prophylactic ban -- expreesly applicable to employees at all salary levels -- on the dishonored practice of accepting honoraria.

The compreheneive ban on honoraria ie warranted by the power and discretion of government employees exercising author-

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[20] 135 Cong. Rec. S15960 (daily ed. Nov. 17, 1989).

ity over members of the public. No arbitrary grade line in the civil service delineates the boundaries of this authority. Many thousands of federal employees below the rank of GS-16 exercise significant power. Capitol Hill staffers habitually make decisions influencing the course of legislation that affects millions of people and billions of dollars;[21] Assistant United States Attorneys wield substantial prosecutorial discretion; FDA and USDA inspectors daily judge what will and will not be allowed into the marketplace; officials in all parts of the government set procurement standards and award valuable contracts. These judgments require complex and often highly discretionary decisions, and the potential for abuse is clear. See supra at 2-3 (applicability of conflict-of-interest statutes to federal employees at all levels). Congress exercised its constitutional authority to insulate such employees from improper influence by prohibiting the receipt of honoraria by civil servants at all salary levels.

2. Executive Branch Regulations Do Not Adequately Protect the Government Interests at Stake

Plaintiffs also urge that the honoraria ban is unconstitutional because existing executive branch regulations are sufficient to prevent corruption and conflicts of interest. That is simply not the case. The courts have never held that

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[21] See Abramson & Rogers, The Keating 535, Wall St. J., Jan. 10, 1991, at A1, A6 ("The young lawyers and political workers staffing the panels have become powerful players in Washington, able to insert language into bills and handle constituent cases on their own.")

the existence of one type of measure aimed at a particular evil vitiates the constitutionality of another, more effective prophylactic measure. See Buckley, 424 U.S. at 27-28 (upholding contribution limits even though bribery laws and disclosure requirements also deal with quid pro quo arrangements).

The existing regulations are not an adequate substitute for the challenged statute. First, these regulations apply only to employees of the executive branch, not to those of the legislative or judicial branches. Thus, without the statute, there would be no binding limits on the receipt of honoraria by congressional staff members. Second, these regulations have proven insufficient to protect the vital government interests at stake. Unlike the 1989 Act, they do not specifically provide for substantial monetary penalties, and their wording leaves ample room for subjective judgments.

Plaintiffs' own affidavits demonstrate the shortcomings of existing regulations. For example, the agriculture editor at the Voice of America (VOA), who has substantial influence over the content of VOA's agricultural coverage, wishes to receive an honorarium to appear at a conference in Rome sponsored by a private agricultural research group seeking "to improve public awareness of the important work [its] international research centers are doing." Prior to the enactment of the honoraria ban, he frequently gave talks for pay about agricultural reporting, which he did not even feel obliged to report to his agency (A. 131-32). A business editor at the

Voice of America (VOA) proposes to continue publishing articles that "deal with the same general subject matter as my VOA job -- business and economics" (A. 88).

More generally, regardless of the topic of an employee's speech or the employee's particular role within the agency, a significant appearance of impropriety arises when an employee is paid to appear before any group with interests affected by the employing agency. For some government agencies, such as the IRS, virtually everyone in the country has an interest in the outcome of its decisions; its tax examiners should not be beholden to taxpaying parties for outside income.

Plaintiffs contend repeatedly that the government has no legitimate interest in employees' speaking and writing on topics unrelated to their work. This assertion is fallacious. Even if an honorarium is paid for a speech or article on an "unrelated" topic, there remains a risk that the payor's interests may be affected by the employee or the employee's agency. Yet it is extremely difficult to define all situations in which a conflict of interest, or an appearance of conflict, might arise. Congress accepted the Ethics Commission's recommendation that to "curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities." Ethics Commission Report at 36 (A. 147). Congress' flat ban on honoraria gives the public full protection against the potential evils.

B. Legislation Concerning the Terms and Conditions of Government Employment Is Subject Only to the Balancing of Interests Test

In regulating the terms and conditions of government employment for employment-related reasons, Congress exercises authority over expressive activities that it cannot wield in other contexts. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568 (1968); see Connick v. Myers, 461 U.S. 138, 140 (1983); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980). In assessing the validity of such a regulation, the court must balance an individual's free speech rights against the interests of the government in promoting the efficiency and integrity of the public service. Instead of meeting the requirements of strict scrutiny, the limitation must be upheld as long as it is supported on "legitimate grounds."[22]

The broad authority of Congress to regulate the conduct of federal employees is best illustrated in the Hatch Act cases. CSC, 413 U.S. 548 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947). Although the Hatch Act absolutely prohibits the exercise of the most fundamental political speech and participatory rights by government employees, 15 U.S.C.A. § 7321 et seq.,

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[22] Rankin v. McPherson, 483 U.S. 378, 388 (1987); Connick, 461 U.S. at 150-51 (citing Ex parte Curtis, 106 U.S. 371, 373 (1882) ("government's legitimate purpose in promot[ing] efficiency and integrity in the discharge of official duties")).

ths Court uphsld the Act without applying the "compelling interest" tsst or requiring that the statute be "narrowly tailored." It was sufficient that Congress sought to promote important governmental interests -- prsventing inefficiency in the civil service and avoiding en eppearance of partiality that would erode confidence in reprssentetive government. CSC, 413 U.S. at 565. Significantly, the Court recognized that Congress faces a range of policy choices regarding permissible activities by government employses, and that it is within Congress' discretion to choose among competing alternatives. Id. at 564.

To support a strict scrutiny standard, plaintiffs cite the Supreme Court decision in Rutan v. Republican Party of Illinois, 110 S. Ct. 2729 (1990), holding that promotion and transfer dscisions premised upon political patronage violate ths First Amendment. Rutan, however, did not abandon the well-established rule in Pickering and CSC and substitute a new standard of review for restrictions on government employees for employment-related reasons. Rather, the Court concluded that ths essential purpose of the challenged practices was to promote the two-party system,[2/] id. at 2735 & n.4, rather than to improvs ths integrity or efficiency of government. "That the government attempts to use public employment to further such interests does not render those interests employment-rslated."

[2/] The majority brushed aside Illinois' subsidiary efficiency claim. Id. at 2737. Since some efficiency component could be claimed for all government rules, ths majority adhered to its basic conclusion that the restrictions were unreleted to employment and thus required strict scrutiny. Id. at 2735 n.4.

Id. at 2735 n.4. Accordingly, the Court simply applied a different standard of review for First Amendment limitations adopted for reasons unrelated to the employment context.

In an effort to avoid the effect of Pickering and the Hatch Act cases and to bring this case under Rutan, plaintiffs insist, incorrectly, that the prohibition on honoraria is unrelated to the functioning of government. The Act rests on the need to prevent interested parties from exerting improper influence over government employees. Payments to employees for speech -- regardless of the subject matter -- raise concerns about corruption and the appearance of impropriety that, as the Supreme Court noted in the Hatch Act cases, go directly to the heart of the government's role as employer. Thus, the legitimate governmental interest test must be applied.

C. Since Government Employees Remain Free To Engage in Speech, the Honoraria Provisions Constitute Only an Indirect and Incidental Burden on Speech Rights

The compelling interest test proffered by plaintiffs is inappropriate for an additional reason: the honoraria ban has only a tangential effect on speech. The statute does not prevent any federal employee from making any appearance or speech or writing any article. Nor does it require employees to make personal financial sacrifices in order to express themselves; they may receive reimbursement for actual and necessary travel expenses. The challenged provision prohibits only one

thing -- personal financial benefit for government employees in return for speeches, appearances, and articles.[24]

Admittedly, precluding financial gain may have some secondary effect on the amount of speech flowing from public servants. See Arcara v. Cloud Books, 478 U.S. 697, 706 (1986) ("every civil and criminal remedy imposes some conceivable burden on First Amendment Protected activities"). The honoraria ban reduces monetary incentives for those employees who make speeches or appearances or write articles solely or primarily for economic gain. But the restrictions at issue here do not stop anyone from speaking. Although plaintiffs repeatedly state that they will be "unable" to write or speak if the ban is sustained, the simple reality is that some employees will be able but unwilling to do so. Any termination of expressive activity in response to the honoraria ban will be indirect and self-imposed. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("[f]reedom of speech presupposes a willing speaker").

General regulatory prohibitions, not intended to control speech but incidentally limiting its unfettered exercise, are tested under the standard in United States v. O'Brien, 391 U.S. 367, 376-77 (1968): an important government interest in regulating nonspeech activity justifies incidental limita-

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[24] The absence of any prohibitions on speaking in the honoraria provisions of the Ethics Act stands in sharp contrast with the flat ban of the Hatch Act, which was upheld because it served important government purposes.

tions on First Amendment freedoms. See Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961). "Where government aims at the noncommunicative impact of an act, the correct result in any particular case . . . reflects some 'balancing' of the competing interests . . ." L. Tribe, American Constitutional Law § 12-2, at 791 (2d ed. 1988). This test controls here. The honoraria ban, like the Hatch Act, is not aimed at suppressing speech, but rather at protecting the integrity of government by closing the channels of improper influence.

Plaintiffs argue that, in certain disparate contexts, strict scrutiny has been applied to restrictions on payment in connection with speech. None of these cases arose in the government employment context, which is controlled by Pickering and the Hatch Act cases.[24] Moreover, none of these cases serves as persuasive authority for plaintiffs' proposition that the honoraria ban imposes a "direct burden" on speech.

Plaintiffs rely on the Second Circuit's opinion upholding New York's "Son-of-Sam" law even though the court concluded that the law directly burdened speech. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990). That law requires proceeds of any book or movie authored by a convicted or alleged criminal about the crime to be placed in escrow for five years to

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[24] In the Hatch Act cases, the government prohibited an entire class of core political speech and associational activities, but its regulations were nevertheless tested under a practical and limited inquiry -- the legitimate interest balancing test. See CSC, 413 U.S. at 565; see also Connick, 461 U.S. at 150.

compensate victims of the crime. Analysis of the First Amendment implications of the Son-of-Sam law has produced a welter of competing opinions regarding the nature of the burden.[24] None of these opinions is controlling in this jurisdiction.

Meyer v. Grant, 486 U.S. 414 (1988), invoked by plaintiffs and by the Second Circuit, also provides no support for applying strict scrutiny to the honoraria ban. Meyer and its lineal antecedent, Buckley, 424 U.S. at 19, concerned payments by persons and organizations attempting to assert core political ideas, a circumstance in which First Amendment protection is "at its zenith." Meyer, 486 U.S. at 425. In both cases, the Supreme Court applied strict scrutiny to limitations on expenditures because the spending was necessary to the dissemination of ideas. Meyer and Buckley dealt with the practical problems of spreading a message through a large and mobile society where direct speech was not, and could not be, a meaningful method of communication; a limit on expenditures was a limit on speech. Conversely, in Buckley, when the Court turned to the making and receiving of contributions -- more closely analogous to the honoraria at issue here -- it

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[24] Compare Children of Bedford, Inc. v. Petromelis, 143 Misc. 2d 999, 541 N.Y.S.2d 894 (Sup. Ct. 1989), aff'd, 556 N.Y.S.2d 483 (App. Div. 1990) (indirect burden) and Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989) (indirect burden) with Simon & Schuster Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990) (direct burden). The District Court opinion was vacated by the Second Circuit. Simon & Schuster is currently seeking en banc review of the panel opinion. Even though the court of appeals reached the questionable conclusion that the Son-of-Sam law imposed a direct burden on speech, it upheld the law's constitutionality.

determined that the effect on speech was only derivative and not subject to the highest scrutiny. Buckley, 424 U.S. at 21.

Similarly, in Meyer, paid canvassers constituted the primary means of disseminating political ideas to the public. Prohibiting payment effectively blocked the ability of referendum proponents to spread their message. Thus, the Court distinguished between expenditures that are instrumental to speech from receipts that act only as an incentive to speech. In the case at bar, direct speech is the method for advancing ideas; the rules challenged do not prohibit the means of communication and thus do not implicate the concerns animating the Supreme Court in Buckley and its progeny.[17] All that is at issue here is a ban on personal financial benefit, not a ban on speech.

D. The Honoraria Ban Provides a Remedy Fitted to the Dimensions of the Problem

Plaintiffs finally contend that the honoraria ban is at once overbroad, underinclusive and not narrowly tailored.[18] These arguments fail because the scope of the remedy fits the

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[17] A similar analysis serves to distinguish the charitable solicitation cases cited by appellants, such as Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) and Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980). In these cases, requests for charitable solicitations were the vehicle for speech by the regulated charities, and the challenged regulations bore only a tenuous relationship to the asserted state interests. See Riley, 487 U.S. at 793 n.7; Schaumburg, 444 U.S. at 636-38.

[18] Plaintiffs assert, without argument, that the Act violates the Due Process and Equal Protection guarantees of the Fifth Amendment. These novel theories merely recast the First Amendment claims under a different label.

dimensions of the problem.[20] Congress, drawing on the teachings of experience, chose to proscribe the conduct that had historically created the problems it sought to remedy.

Although the honoraria ban is broad in its reach, its breadth does not make it unconstitutional. The Supreme Court has repeatedly upheld far-reaching statutory restrictions designed to promote the integrity and efficiency of the public service. The controlling case law is once again the Court's decisions in the Hatch Act cases. In Mitchell, plaintiffs argued "'that the impartiality of many of these [government employees] is a matter of complete indifference to the effective performance' of their duties." 330 U.S. at 101. Acknowledging that the political activities of government employees may or may not affect the government interest in any individual instance, the Court nevertheless upheld the statute. "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." Id. at 101 & n.37.

The analysis in CSC follows a similar path. The Court cited Senator Hatch's statement that his Act's broad prohibition was necessary because he "'would draw the line if it could be drawn; but I defy . . . [anyone] to draw that line'". CSC, 413 U.S. at 566 n.12 (quoting 86 Cong. Rec. 2626 (1940)). The Court

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[20] See Buckley, 424 U.S. at 28 (contribution limit focuses precisely on the area "where the actuality and potential for corruption have been identified," while leaving persons free to engage in other types of political activity).

gave Congress substantial latitude to formulate broad prohibitions to protect the integrity of the federal service.

The same standards apply here. Congress limited its prohibition to the dishonored practice of honoraria and promulgated rules neutral as to content, viewpoint, and setting.[14] Plaintiffs can ask no more of Congress. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 11 (1988) (requiring substantial overbreadth for facial challenges); Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973).

Plaintiffs also contend that the Act is underinclusive and arbitrary, because it does not proscribe conduct claimed to be functionally analogous to appearance, speeches and articles.[15] This claim again ignores the lessons of history. Congress, and the commissions on whose work it relied, determined after investigation that the historic ill lay with honoraria for articles, appearances, and speeches. It found no past evil lurking in payments for other forms of conduct or speech. Congress cannot reasonably be faulted for failing to regulate the economic consequences of all expressive activity out of a reflexive desire for uniformity. Even if the Act

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[14] Content distinctions are, of course, disfavored in First Amendment jurisprudence, see Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530, 536-37 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972), and Congress' attempt to avoid them is grounds for praise rather than reprobation.

[15] Plaintiffs' attacks on the Office of Government Ethics' preliminary rules as arbitrary and content-based are inappropriate in the context of a facial challenge and merely illustrate the premature aspects of their case.

involves partial measures towards the final refinement of the ethics laws, Congress' "careful legislative adjustment . . . in a 'cautious advance, step by step,' NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937), . . . warrants considerable deference . . ." NRWC, 459 U.S. at 209.

Finally, plaintiffs argue that the extension of the honoraria ban to middle and lower level employees renders the Act constitutionally infirm. As discussed above, the coverage of the ban on honoraria is warranted by concerns -- reflected in the long history of conflict-of-interest legislation -- about the power and discretionary judgments of government employees at all levels. Many thousands of employees below the rank of GS-16 make complex and often highly discretionary decisions that substantially affect the public interest and create a clear potential for abuse. See supra at 16-17.

The list of discretionary functions is virtually endless, but it is not even necessary to look beyond the confines of this case for examples. Plaintiffs Grant and Fishell, and affiant Shelton, are tax examiners or tax examining assistants employed by the Internal Revenue Service (A. 93, A. 100, A. 125). One plaintiff manages a discretionary grant program (A. 128); another handles applications for program certification (A. 90); two plaintiffs prepare and select materials for broadcast around the world by the Voice of America (A. 86, A. 131). Congress could reasonably conclude that such federal employees wield significant discretionary authority, a discretion that

differs only in degree from that wielded by more senior members of the public service. Plaintiffs offer no reason why this policy judgment is unsound, much less unconstitutional.

At bottom, plaintiffs' contentions rest on policy disagreements with Congress. Appellants virtually concede that Congress may limit honoraria for Members of Congress, members of the judiciary, and senior executive branch officials. They invade the policy arena by attaching distinctions of constitutional dimension to the narrow gap between GS-16s and GS-15s and contending that Congress may legislate over one group but not the other. Congress could, and indeed did,[12] debate the wisdom of drawing lines among employees, but decided that the rules governing upper echelon officials should apply equally to middle and lower level employees. Such judgments are for Congress, not the courts, to make.[13] "Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." NRWC, 459 U.S. at 210; see Federal Election Comm'n v. National Conserv. Political Action Comm., 470 U.S. 480, 500 (1985); Buckley, 424 U.S. at 127.

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[12] After the passage of the Act, Senators Glenn and Roth introduced an amendment to revise the effects of Title VI on employees below GS-16. See 136 Cong. Rec. S17257 (daily ed. Oct. 26, 1990). The amendment passed the Senate by voice vote but the House failed to act on it. The proposal proves, contrary to plaintiffs' blanket assertions, that the issues raised in this lawsuit have been duly considered by Congress.

[13] As the Supreme court acknowledged in CSC, "Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it." CSC, 413 U.S. at 567.

II. THE DISTRICT COURT CORRECTLY DECIDED THAT PLAINTIFFS HAVE FAILED TO SHOW IRREPARABLE INJURY

In addition to their slight probability of success on the merits, appellants are not entitled to preliminary injunctive relief because -- as the District Court correctly found -- they have failed to demonstrate irreparable injury. The District Court's determination in this respect must be upheld absent an abuse of discretion or clear error. See Wagner v. Taylor, 836 F.2d 566, 576 (D.C. Cir. 1987).

Appellants suggest throughout their papers that they would be irreparably damaged by the lose of opportunities to earn money if a preliminary injunction or a temporary restraining order does not issue. The temporary loss of income alone, however, does not constitute irreparable injury within the meaning of the preliminary injunction standard. Sampson v. Murray, 415 U.S. 61, 90 (1974). Since appellants either can arrange for deferral of payment until the resolution of this proceeding or, failing that, seek recovery under the rule of Dellums v. Powell, 566 F.2d 167, 194 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978), they are not irreparably prejudiced by implementation of the honorarium prohibition pending judicial resolution of the constitutionality of the Act.

Indeed, many of the claims about the effects of the Act on individual plaintiffs rest on untested and premature assumptions about the operation of the statute. To the extent that the statutory prohibitions do not apply to these individ-

uals, they will not suffer any injury. Several plaintiffs and affiants, including Crane, Feyer, Grant, Hubler, Mark, Putnam and Shelton, declare that they could not afford to continue writing articles because of the substantial travel costs associated with research.[W] However, the statute expressly permits reimbursement for actual and necessary travel expenses.

Plaintiff Hubler also asserts that he would not write travel articles without compensation because his "professional standards" prohibit him from undermining the livelihoods of his colleagues, who need to be paid for their work. His concern appears to be misplaced. Under the statute, Hubler may comply with the statute while still causing the employer to pay for his articles; he may direct that the payments be made to charity, so long as he does not claim any tax benefits from this action.[W]

Affiant Shelton works as a stringer for the Associated Press and writes a hospital newsletter. Since the Office of Government Ethics (OGE) interprets "honoraria" to exclude payment "by an employer for services on a continuing basis that involve . . . writing," he may be able to continue his pursuits without violating the prohibition.[W] Similarly, Thomas Fishell, an ordained minister, regularly performs weddings and

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[W] A. 85, A. 91, A. 102, A. 105, A. 116, A. 124, A. 126.

[W] Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (§ 501(c) of Ethics in Government Act).

[W] See Office of Gov't. Ethics, Memorandum on Honorarium Prohibition and Limitations on Outside Earned Income and Employment at 4 (1990) (A. 60).

funerals and delivers sermons at local churches, and Judith Hanna engages inter alia in private consulting activities. These services may -- or may not -- prove to be permissible professional services rather than "speeches" or "appearances" within the honorarium ban. OGE Memo at 4 (A. 60). The OGE possesses administrative mechanisms for the resolution of these questions, but plaintiffs have chosen instead to bring an action in the first instance in federal court. The lingering factual questions undermine plaintiffs' claims that they will face "irreparable injury" absent preliminary injunctive relief.

Plaintiffs also argue that any deprivation of First Amendment rights constitutes irreparable harm. This attempt to attach talismanic significance to the form of the claim must fail, since it would require the grant of preliminary relief whenever a movant makes a colorable constitutional claim. See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803 (1984). Rather, the case law reflects the proposition that, in balancing the applicable factors, the court should take account of the nature and gravity of the constitutional claim. See Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978); Joyner v. Lancaster, 553 F. Supp. 809, 815 (M.D.N.C. 1982).

Appellants' reliance on the plurality opinion in Elrod v. Burns, 427 U.S. 347, 373-74 (1976) is equally misplaced. In contrast to the immediate threat of discharge in Elrod, the implications of the honoraria ban over a short time period are limited. Appellants may continue to engage in speech during the

pendency of this action, and, thus, the concerns about the timeliness of speech central to the Elrod plurality opinion are inapplicable here. Indeed, interim relief would not eliminate the "chilling effect" asserted by appellants, because even if such relief were granted, appellants would remain uncertain whether the honoraria ban will be upheld on the merits. See Savage v. Gorski, 850 F.2d 64, 67-68 (2d Cir. 1988).

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST IN GOVERNMENT INTEGRITY MILITATE AGAINST PRELIMINARY RELIEF

The remaining two factors -- the balance of hardships and the public interest -- also weigh heavily against preliminary relief. An injunction would substantially interfere with the implementation of government ethics rules instrumental to restoration of public faith in impartial and honest government. If this Court were to enjoin the honoraria ban, there would be no statutory ceiling on the size of honoraria that an employee could accept.[17] Any executive, legislative or judicial official or employee presently covered by the Act would be free to accept an honorarium of any size for an appearance, speech or article.

Appellants assert, incorrectly, as proof that no harm would be caused by injunctive relief, the fact that Congress

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[17] The 1989 legislation substituted the total ban on honoraria for the previously existing $2,000 ceiling on the amount of any given honorarium. The $2,000 ceiling is no longer in effect (except for Senators and Senate staffers). See Pub. L. No. 101-94, § 601(a), 103 Stat. 1762 (§ 505(b)(2) of Ethics in Government Act) (conforming amendments).

postponed the effective date of the honoraria ban until January 1, 1991. But the fact that Congress allowed a transition period before the effective date of the Act suggests only that it struck a fine balance to alleviate some of the economic consequences for government employees. Indeed, the existence of the transition period illustrates a converse proposition; the fact that appellants chose to sit on this lawsuit for over a year suggests that the impact of Title VI on constitutional rights is not nearly so pervasive as they contend. Cf. Delmatoff, Gerow, Morris, Langhans, Inc. v. Children's Hosp. Nat'l Medical Center,, 12 U.S.P.Q.2d 1136 (D.D.C. 1989).

In ascertaining the public interest, the federal courts give substantial deference to the policies of Congress. See Cincinnati Elecs. Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975) (avoiding disruption of the government procurement process). Appellants' repeated reliance on the remarks of appellee Potts is simply irrelevant. Courts defer to the determinations of Congress and the President, not to the alleged opinion of one executive branch official. Congress' and the President's joint judgments about the importance of the honoraria prohibition for restoring integrity and faith in government must be given preclusive weight in balancing the public interest in the statute. See 7 J. Moore, J. Lucas, K. Sinclair, Moore's Federal Practice, ¶ 65.04(1) (1990 ed.).

CONCLUSION

For the reasons stated above, the Court should deny plaintiffs-appellants' emergency motion for preliminary injunctive relief. Appellants have shown no basis for judicial interference in the implementation of the important government ethics provisions here at issue.[W]

Respectfully submitted,

Lloyd N. Cutler
Roger M. Witten
Carol F. Lee
Kenneth P. Stern

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Counsel for Amicus Curiae
Common Cause

January 15, 1991

[W] If, however, this Court were to decide to grant injunctive relief, any such order should be limited to the enforcement of the Act with respect to middle and lower level executive branch employees.

CERTIFICATE OF SERVICE

I certify that on January 15, 1991, two copies of the Brief of Amicus Curiae Common Cause in Support of Appellees were hand-delivered to counsel for each of the parties, as follows:

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Carol F. Lee

APPENDIX 3.—LETTER TO HON. BARNEY FRANK, FROM JANET GARRY, CHAIRMAN, FEDERAL EMPLOYEES COORDINATING COMMITTEE, DATED FEBRUARY 19, 1991

Federal Employees Coordinating Committee

Faburary 19, 1991

The Hon. Barney Frank
Chairman
Subcommittee on Administrative Law
and Governmental Relatione
Committea on the Judiciary
U.S. Housa of Repreeentativee
Waahington, D.C. 20515

Re: H.R. 325, Eaaing
tha Honoraria Ban

Dear Chairman Frank:

Tha Federal Employeaa Coordinating Committee (FECC) ia a coalition of associations repreaenting the intereste of a broad crosa aaction of federal executive, management and profsaaional employees. We very much appraciata your lsadarship in introducing legislation to modify the honoraria ban to which federal employeae ara all aubject ae a reault of the Ethics Reform Act of 1989.

Two of our member groups, the National Council of Social Security Management Aasociations and tha Ssnior Executivee Association, aubmitted statements regarding your legislation for inclusion in the record of haarings you hald earlier this month. This letter ie writtan in aupport of thoaa atatemante, which included examples of carear federal employsea who have complied with existing etandards of conduct and obtained agancy approval for their activities in the paet but now find thamselvee in violation of tha law if they continue to accept paymant for making epaaches and writing articlaa on their own time.

Each of the FECC asaociationa hae haard from members who are experiencing the inequitable impact of the abaolute ban on honoraria which went into effact January 1. Although thair outeide activities nsither conflict with nor impinga on their federal work rasponaibilitias, they suddsnly find themselvea barred from accepting payment for those activitiea. The FECC urgaa awift action by Congraaa to correct thie inaquity.

815 Connecticut Avenue, Suite 800, Washington, D.C. 20006
(202) 463-8400

Several of the FECC associations expressed concern about whether your legislation would restore to federal agencies the same discretion they were permitted prior to January 1, 1991, to approve the writing and speaking activities of their employees. We would not favor more stringent regulation as a result of a new statutory requirement that honoraria could only be accepted for activities "unrelated" to an employee's position or status. Prior to January 1, for example, some agencies encouraged their professional employees to write articles related to research conducted at the agency, in order to further the government's interest in having research findings widely publicized. While agencies generally require submission of such articles for agency review prior to publication, they often do not prohibit acceptance of honoraria from the publishers. The FECC strongly recommends that agencies be permitted to continue such practices.

We have examined testimony presented to Congress by the Office of Government Ethics which indicates that OGE does not forsee a more rigid "relatedness" test than was applied in the past. OGE points out that Executive Orders 11222 (1965) and 12674 (1989) "prohibit an employee from engaging in outside activities that are not compatible with the full and proper discharge of the duties and responsibilities of their government employment." We recommend that this reasonable prohibition and the attendant, longstanding test for approval of acceptance of honoraria remain the overarching directives to federal agencies after enactment of H.R. 325 or other legislation modifying the honoraria ban.

Thank you for consideration of our views. We request that this letter,if it is received in time, be included in the record of the February 7, 1991, hearing on the issue of easing the honoraria ban for federal employees.

Very truly yours,

Janet Garry

Janet Garry
Chairman
Federal Employees Coordinating
Committee

:jg

APPENDIX 4.—LETTER TO HON. BARNEY FRANK, FROM MICHAEL B. STYLES, NATIONAL PRESIDENT, FEDERAL MANAGERS ASSOCIATION, DATED FEBRUARY 22, 1991

FMA

Federal Managers Association

February 22, 1991

The Honorable Barney Frank, Chairman
Subcommittee on Administrative Law
and Governmental Relations
United States House of Representatives
B-351A Rayburn House Office Building
Washington, D.C. 20515

Re: Honoraria Ban on Federal Employees

Dear Mr. Chairman:

The Federal Managers Association submits the following comments for the record on the Federal employee honoraria ban imposed by the Ethics Reform Act of 1988.

Let me extend our thanks for your Committee's prompt attention in holding the recent hearing on this issue. In addition, we appreciate your personal interest in the matter through your sponsorship of HR 325, legislation that would allow employees of the Federal civil service to receive honoraria for appearances, speeches and articles, so long as their receipt does not compromise the performance of their official duties.

As you know, the Ethics Reform Act enacted an absolute ban against receipt of honoraria for "speeches, articles or appearances" by all officers and employees of the Federal Government, except Senators and their staffs. As a result, effective January 1, 1991, Federal employees may not receive payment for speeches they deliver or articles they write on their own time on subjects that are independent of their official duties or status. Before passage of the Ethics Reform Act, these employees could have received honoraria for such activities without violating any laws or regulations.

We support the repeal of the honoraria ban with respect to career members of the Federal civil service, so long as their receipt of honoraria does not compromise the performance of their official duties. Our position is warranted for the following four reasons.

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First, the ban is unnecessary. There is no evidence of any abuse or misuse involved in the receipt of honoraria by Federal employees in matters independent of their official duties. Congress could not have intended to ban honoraria for all Federal employees across government. While FMA believes that the ban should continue to apply to non-career members of the Senior Executive Service, it should not apply to any other Federal employee who receives honoraria for an appearance, article or speech, so long as payment of the honorarium would not compromise the performance or nonperformance of the Federal employee's official duties.

Moreover, sufficient restrictions pre-existed the ban. Many Federal departments and agencies already have mechanisms requiring employees to seek prior approval to receive honoraria if they may conflict with their official duties, or appear to cause such a conflict.

Third, honoraria restrictions should guard only against conflicts of interest. They should go no further. The new ban unnecessarily deprives Federal employees from the opportunity to earn supplemental income from speaking and writing on their own time on subjects that have nothing to do with their official duties or status. We believe this is excessive and unfair.

Finally, the ban undermines Federal employee morale. The ban is confusing and demoralizing to Federal employees. Moreover, it will deter some qualified and competent individuals from accepting Government jobs.

Thank you for the opportunity to offer these comments on the honoraria issue. We look forward to working closely with you and your Committee as it continues to respond to this matter.

Sincerely,

Michael B. Styles

Michael B. Styles
National President

APPENDIX 5.—LETTER TO HON. BARNEY FRANK, FROM HELEN M. POLLOCK, PH.D., AND KENNETH I. BERNS, M.D., PH.D., OF THE AMERICAN SOCIETY FOR MICROBIOLOGY, DATED FEBRUARY 26, 1991

PUBLIC AND SCIENTIFIC AFFAIRS BOARD

AMERICAN SOCIETY FOR MICROBIOLOGY

1325 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20005
TEL. (202) 737-3600
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February 26, 1991

The Honorable Barney Frank
Chairman, Subcommittee on Administrative
Law and Governmental Relations
House Judiciary Committee
B 351A Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Frank:

The American Society for Microbiology (ASM) would like to express its appreciation on behalf of its members for the swift introduction and action taken in regard to legislation which would revise the prohibition on acceptance of honoraria by federal employees. The ASM is the largest single biological life sciences society in the world with over 38,000 members, many of whom are funded or employed by the federal government.

Under PL 101-194, federally employed microbiologists and VA physicians, who are also university faculty members, cannot accept compensation for activities, including serving as a visiting professor, giving lectures and publishing some articles or books, despite the fact that these activities are essential to the academic world and to professional advancement. The honoraria ban denies government-employed microbiologists and VA-university physicians the same participation in academic pursuits that is available to their university colleagues. We recommend that Title V of PL 101-194 be amended to allow physicians to bave cross appointments in the Veterans Administration and their affiliated universities and to give lectures in the area of their expertise, as well as enable a microbiologist employed by the federal government to give seminars and publish articies for compensation on microbiological subjects. For example, a microbiologist who does research on vaccine development for various diseases should be permitted compensation for giving talks and writing chapters about information which is in the public domain. Language in HR 325 should be modified to ensure that there is no restriction on the free exchange of scientifie information between government and academic scientists.

Once again, thank you for your efforts in this matter. We would be pleased to provide additional information and assist the Subcommittee in any way possible.

Sincerely,

Helen M. Pollock

Helen M. Pollock, Ph.D.,
Chairman, Committee on Professional
Affairs, PSAB, ASM

Kenneth I. Berns

Kenneth I. Berns, M.D., Ph.D.,
Chairman, Public and Scientific
Affairs Board, ASM

APPENDIX 6.—ARTICLE, NEW YORK TIMES, ENTITLED, "FEDERAL WORKERS FACE SPEECH CURBS," DECEMBER 4, 1990

FEDERAL WORKERS FACE SPEECH CURBS

Ethics Agency Bans Payment for Writing or Talks, Even if Subject Is Unrelated

By ROBERT PEAR
Special to The New York Times

WASHINGTON, Dec. 3 — The Federal ethics agency told Government workers today that they could not accept payment for writing articles or giving speeches, even if the subject is completely unrelated to their work.

Under the new policy, for example, a State Department official or Justice Department lawyer would be prohibited from taking money for a lecture on orchids or for a magazine article on coin collecting.

Government employee unions say thousands of Federal workers engage in such activities in their off-duty time and will be affected by the ban. It is unclear precisely how many Federal workers will be affected.

"It's fairly common" for Government employees to be paid for articles and speeches unrelated to their work, said Stephen D. Potts, head of the Federal Office of Government Ethics, which issued the directive.

Free Speech Violation Seen

Federal workers and First Amendment lawyers say the new restrictions, mandated by Congress, violate Federal employees' rights of free speech. The maximum penalty for a violation is $10,000 or the amount of payment received for an article or speech, whichever is greater.

In his directive, Mr. Potts said, "Executive branch employees have long been prohibited from receiving any compensation, including honoraria, for speaking and writing on subject matter that focuses specifically on the employing agency's responsibilities, policies and programs; when the employee may be perceived as conveying agency policies, or when the activity interferes with his or her official duties."

Starting Jan. 1, he said, "receipt of compensation will be prohibited for any appearance, speech or article, regardless of the subject matter or circumstances." Mr. Potts said the ban was being imposed as a result of the Ethics Reform Act, signed by President Bush on Nov. 30, 1989.

Military Officers Affected

The ban applies to Federal judges as well as to employees of the executive branch, including military officers and civilian employees of the Defense Department. Of the 907 Federal judges who filed financial disclosure statements in 1987, 110 reported receiving payments for speeches or articles. Last August the Judicial Conference of the United States, the policy-making arm of the Federal judiciary, adopted rules prohibiting judges from accepting such payments.

THE NEW YORK TIMES

DECEMBER 4, 1990

Among those complaining about the prohibition is Jan Adams Grant, an employee of the Internal Revenue Service who receives $22,200 a year in Federal wages and $3,000 for freelance articles on camping and the environment.

The ban "steps all over my rights," Mrs. Grant said in an interview. "The I.R.S. approved my outside activities. The ban will interfere with people's right to express opinions in magazines and lectures."

The National Treasury Employees Union filed a lawsuit challenging the ban last week, and the American Civil Liberties Union said it might do so, too. John Vanderstar, a lawyer at the Washington firm of Covington & Burling who is a member of the civil liberties group, said he was preparing a lawsuit for the group.

"On its face, the ban appears to pose severe problems under the First Amendment, requiring Government employees to give up the right to speak and write and get paid for it," he said.

Some Exceptions Noted

The new policy contains some exceptions. A Federal employee may, for example, accept payment for writing books of any kind. Mr. Potts said it was likely that Federal employees would also be allowed to take money for writing "works of fiction, poetry, lyrics and scripts."

In addition, a Federal employee may, in some situations, order that up to $2,000 in payment for an article or speech be diverted to "a charitable organization." But the employee cannot take a tax deduction for such contributions, and neither Federal employees nor their relatives may derive any financial benefit from the gift.

In the past the Government encouraged its employees to lecture and write, so long as such activities did not interfere with their official responsibilities. A Federal regulation adopted in the 1960's says that Federal employees "are encouraged to engage in teaching, lecturing and writing that is not prohibited by law" or regulation.

Executive Orders Cited

In April 1989 and again two months ago, President Bush signed executive orders that prohibit full-time Presidential appointees holding political jobs in the executive branch from receiving "any earned income for any outside employment or activity."

Senator John Glenn, an Ohio Democrat who is chairman of the Committee on Governmental Affairs, and Senator William V. Roth Jr. of Delaware, the ranking Republican on the committee, tried unsuccessfully to relax the ban on payments to civil servants for speeches and articles unrelated to their work.

Mr. Potts supported those efforts. He said in an interview today that the law as it now stands was "too restrictive."

John N. Sturdivant, president of the American Federation of Government Employees, which represents 700,000 Federal workers, said, "In its rush to clean up its own house, Congress was overbroad and included all Federal employees in the ban on honoraria."

APPENDIX 7.—ARTICLE, WASHINGTON POST, ENTITLED, "ETHICS LAW'S DEEP REACH INTO BUREAUCRACY," JANUARY 3, 1991

THE WASHINGTON POST ... THURSDAY, JANUARY 3, 1991 A19

Ethics Law's Deep Reach Into Bureaucracy

Honoraria Ban Curtails Employees' Outside Work; Court Challenge Cites First Amendment

By Dana Priest
Washington Post Staff Writer

As of last Tuesday, the federal government prohibits Thomas Fishell, an Internal Revenue Service tax examiner in Dallas, from collecting fees for weekend weddings and funerals such as he has performed as a Southern Baptist minister for the last 11 years.

Jan Adams-Grant, an IRS employee in Ogden, Utah, is no longer allowed to earn a cent from freelance articles on camping and the church seminars on earthquake preparedness she has conducted for several years.

Adams-Grant and Fishell, who received their supervisors' approval that the outside work did not constitute a conflict with their federal jobs, have become the unwitting players in the latest Capitol Hill conflict-of-interest controversy.

Under the Ethics Reform Act of 1989, federal employees are banned, starting this year, from accepting honoraria—outside income—for speaking or writing, regardless of the subject they speak or write about and how it does or does not relate to their government jobs.

Congressional aides involved in drafting the law and federal employees unions lobbying Capitol Hill on the matter said the inclusion of all federal employees was unintended and that several members of the House and Senate are preparing language to modify the act this session to exclude federal workers from its provisions.

At the same time, the American Federation of Government Employees, the National Treasury Employees Union and 10 employees represented by the American Civil Liberties Union have filed suit against the government to overturn the ban as it applies to federal employees. The suit charges that the act infringes on employees' First Amendment rights, which "are directly burdened by the prohibition on receipt of income from speeches, appearances, and articles."

In other words, prohibiting payment for such articles and appearances will effectively make it impossible for employees to continue to conduct these activities.

The ban on federal workers accepting outside income for speaking or writing, new this year, applies regardless of the topic involved.

Because most employees affected cannot afford to absorb the costs associated with researching articles or delivering speeches, "it is really not just a ban on accepting money, but it makes it virtually impossible to write" or make public appearances, said David Klein, assistant counsel for the treasury employees union. "People can sell roses, they just can't write about them or talk about them. That's obviously singling out speech."

Government attorneys have argued that the act does not infringe on workers' First Amendment rights because it does not deny employees the right to speak or write, only to get paid for it.

Two federal courts have refused the plaintiffs' request for an emergency, temporary halt to the prohibition while they attempt to permanently overturn it. On Saturday, attorneys for the plaintiffs asked the Supreme Court to block the honoraria ban for federal employees until their legal challenge is resolved in the courts.

The Supreme Court has asked the solicitor general's office to file a reply to the request, Klein said a court clerk told him the court is likely to discuss the request in its regular Friday conference.

Arguments on the merits of the suit have not been scheduled in U.S. District Court here.

The honoraria ban for all federal employees was a last-minute addition to the act, which primarily deals with limiting outside income received by House members, their staffs and executive branch political appointees and restricts the type of work permitted for recently retired or resigned high-level federal executives in private practice. House members and senior executive branch employees got hefty pay raises as part of the package. The raises, which also took effect Jan. 1, are as high as 33 percent for some employees.

The act was adopted after a wave of high-profile conflict-of-interest scandals, including one that led then-House Speaker Jim Wright (D-Tex.) to resign.

Under the ban, federal employees and others are allowed to perform other sorts of outside work, including fiction writing and certain teaching positions.

The ban allows employees to donate what would have been their honoraria to charity, although they may not claim a tax deduction for the donation and may not donate more than $2,000 to any one charity.

There was an attempt at the end of the last session to amend the act to exclude federal employees below Grade 16 on the General Schedule. The attempt failed, in part because certain members, including House Judiciary Committee Chairman Jack Brooks (D-Tex.), objected to the GS-16 cutoff, according to congressional aides.

The debate going into the new session is likely to center on whether all federal employees should be exempt from the honoraria ban, or just those in non-policy-making positions under the GS-16 level.

The public interest lobby group Common Cause objects to a change exempting all federal employees and wants to ensure that low- and mid-level employees would continue to be restricted from performing outside activities that conflict with their federal jobs.

"We believe that top officials in government, people with the greatest responsibility, should be completely out of the business of receiving fees from private interest groups," said Common Cause President Fred Wertheimer.

High-level employees should not be allowed to collect honoraria even from outside groups that appear to have no possible connection with the employee's job, he said, because to do otherwise, "you're going to get into a case-by-case analysis that, in our view, doesn't provide the kind of protection a clear ban provides."

For employees such as Adams-Grant and Fishell, the ban is a ludicrous byproduct of a congressional ethics problem that does not really involve them.

"There's absolutely no ethical conflict" with being a part-time minister and a tax examiner, said Fishell, a GS-6 who became a minister at age 19. "It's offensive to me to have Congress lecture me now about ethics. Congress needs to not get paid for speaking because there's nothing they can speak about that they later on can't make laws on."

Although Fishell said he believes he might be able to continue a small amount of his former outside work without getting paid—he isn't about to turn down marrying friends just because he isn't allowed to accept their money—Adams-Grant said she clearly would not.

"I can't afford to do it," she said. "It really is my right to free speech that I can't afford."

APPENDIX 8.—LETTER TO HON. BARNEY FRANK, FROM FRANK G. BURKE, PRESIDENT-ELECT, SOCIETY OF AMERICAN ARCHIVISTS, DATED MARCH 5, 1991

The Society of American Archivists

600 S. Federal, Suite 504, Chicago, Illinois 60605 (312) 922-0140

March 5, 1991

Honorable Barney Frank, Chairman
House Subcommittee on Administrative Law
and Governmental Relations
U.S. House of Representatives
Washington, DC 20525-6218

Dear Mr. Frank:

You and your associates are to be congratulated for the efforts that you are making to revise the Ethics Reform Act of 1989 insofar as it relates to honoraria paid to government employees for published articles and speeches. The almost 3,000 members of the Society of American Archivists applaud your action in this matter. I am happy to enclose a position paper drafted by the Society on this act. Please include this letter and the position paper as part of the hearings that were held on February 7.

We of the Society of American Archivists concur with your stance that Federal employees should not be restrained by the ban on honoraria and we support the wording of H.R.325. In coordination with members of other organizations related to the mission and goals of the Society of American Archivists, we support the views of witnesses at the hearing that the law should be retroactively amended, to January 1, 1991, and that the "relatedness test" should be modified by revising section (2)(A)(i) by replacing the word "unrelated" with the words "not closely related."

The members of the Society, many of whom are Federal archivists, wish to thank you for your work in revising the Ethics Reform Act, and urge passage of H.R. 325.

Sincerely,

Frank G. Burke
President-elect

ETHICS REFORM ACT OF 1992
POSITION OF THE SOCIETY OF AMERICAN ARCHIVISTS

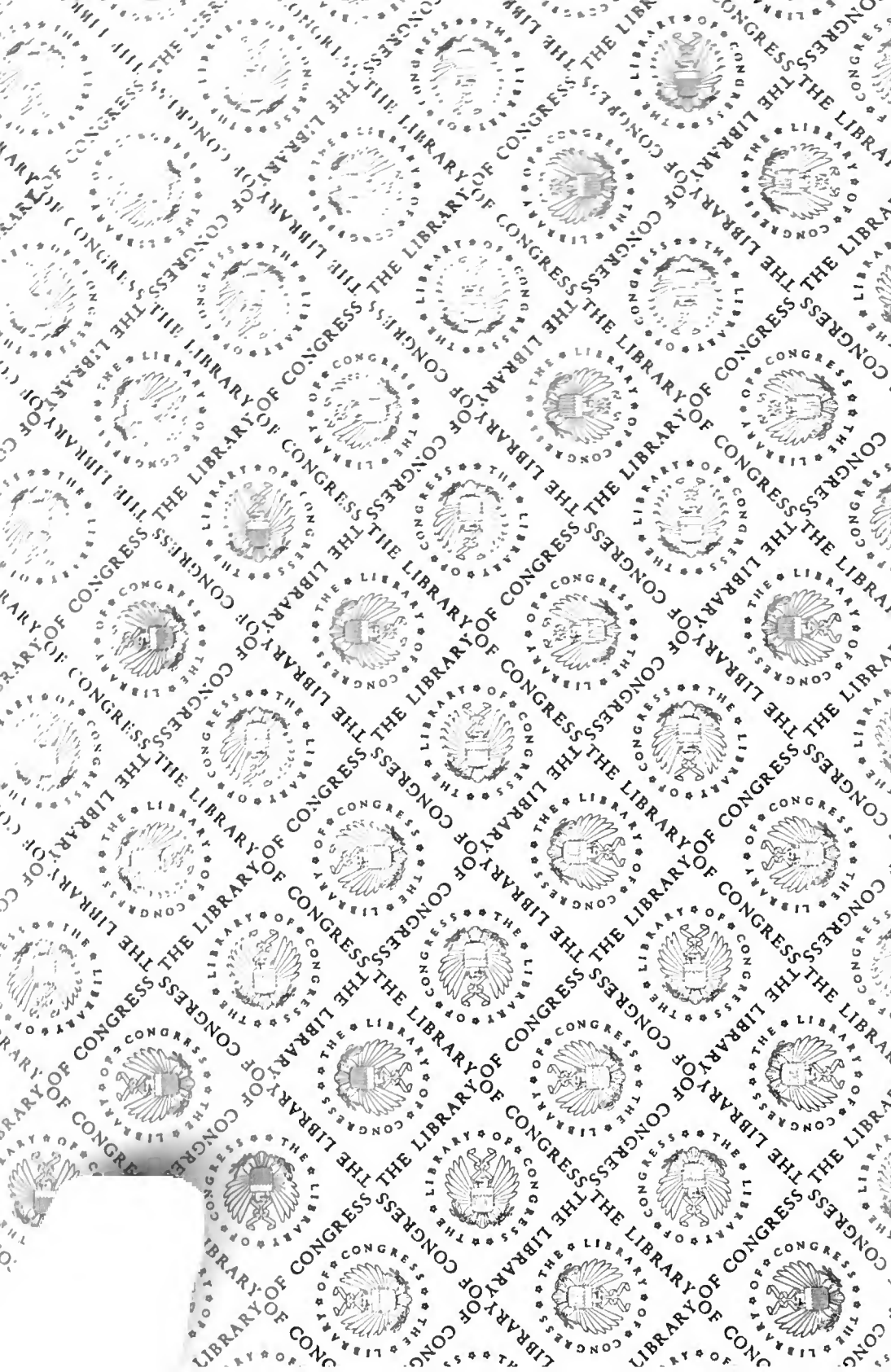
The Society of American Archivists represents some 3,000 archivists, records managers, information speciallsts and other professlonals concerned with the documents of government, organizatlons and instltutlons and the signlficant papers of individuals. There are archivists in every communlty, in all geographic areas, and over 300 archivists are employed by the federal government.

It is this latter group that ls specifically affected by the honorarla restrictions placed on all Executive Branch employees by Title VI of the Ethics Reform Act of 1989. The Society believes, along with many other professionals in and outside of the federal government, that the original intent of the act was aimed at members of congress and high government officials, and was to prohibit payment for appearances, speeches and articles that were job-related or stemmed from knowledge gained on the job. Unfortunately, the interpretation of the proposed amendments to the act is that it will broaden the restrictions, and will specifically exclude payment for appearances, speeches or articles even if they are not job-related, and the act will be broadened to include all government employees.

Federal archivists frequently write, teach at the university level in adjunct appointments, contribute to professional organizations, such as the Society of American Archivists by conducting workshops, or speak before groups on topics unrelated to their duties on the job. Their education and outside interests continue beyond the federal employment. To deny such individuals the right of intellectual intercourse is, in effect, a blow to schoiarship, professional exchange of ideas, and intellectual freedom. In short, the innocent are being punished for the sins of the few guilty parties in government

The impact of the law could well backfire. By limiting the professional and even professionally associated social activities of archivists and of related professionals in government, their own skills are being undermined, and the interactions and communications necessary for them to keep abreast of contemporary thought in their own fields is stifled. This is then reflected in the workplace, where they are expected to apply those skills that they keep honed outside. In order to maintain an effective force of scholarly-minded, productive professionals, the government should be further encouraging their external activities, rather than prohibiting them.

The Society of American Archivists can see no simple way of correcting the proposed Ethics Act amendments, since it has been drafted with almost total disregard of those professionals who teach, lecture or write in their outside activities, even when such teaching, lecturing or writing are not even peripherally related to the daily tasks or professional responsibilities that such persons perform for the government. Returning to the original intent of the Ethics Act - restrictions on congressional honoraria - seems the only reasonable solution to a badly conceived piece of legislation.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